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ABSTRACT

This paper traces the development of the government-to-government relationship between the United States and Native peoples and examines the implications of that relationship for Native American education. In 1532, Francisco de Vitoria refuted the Doctrine of Discovery and laid out four principles to guide Spanish governmental relations with Native peoples. Colonial powers and, later, the United States recognized the sovereignty of Native nations by entering into over 800 treaties with them. A 1794 treaty was the first to contain provisions for Indian education. In 1871 Congress ended treaty-making with Native governments, essentially legalizing Native assimilation and land annexation. The Bureau of Indian Affairs (BIA) controlled all aspects of Native education and government. In 1934, in response to criticisms in the Meriam Report, Congress reaffirmed tribal self-government and provided financial inducements to states to enroll Natives in public schools. Following efforts in the 1950s to terminate the government-to-government relationship, the Federal Government in the 1960s reaffirmed its support for Native self-determination and tribally controlled education. The present trend of shifting responsibility for Native education from BIA and tribal schools to public schools has resulted in a real loss of Native control. Contemporary roles in Native education are described for various federal agencies, tribal governments, Native communities, and state governments. Recent Supreme Court decisions concerning the rights and jurisdiction of tribal governments are outlined. This paper contains 26 references and cites 46 court cases and 30 statutes. (SV)

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Responsibilities and Roles of Governments and Native People in the Education of American Indians and Alaska Natives

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Abstract

The standards set forth five hundred years ago to guide the political relationship between the Native peoples of the Americas and the peoples of Europe are the standards that govern that relationship today. The political equality of American Indians and Alaska Natives is manifested in the government-to-government relationship and the recognition of inherent tribal sovereignty. The powers of Native governments are a vital living force utilized every day in Indian Country. The rest of American society may rarely hear or see these powers unless a litigated controversy is handed down from a federal court or the U.S. Supreme Court. It will catch a moment's notice because the idea of Native governmental powers may seem such an anomaly.

Many of the Native governmental powers remain intact; and, although there has been encroachment in some areas as a result of judicial decision or statutory enactment, the basic authority of the legislative, executive, and judicial departments of Native governments remain ready to be exercised. These powers are defended by the Native governments themselves, by the Congress, and by the courts. Although at the present moment, Congress is the defender of Native governmental powers, the traditional supporter of such powers has been the Supreme Court. When the United States entered into the government-to-government relationship, it made a commitment to support the Native governments. Native leadership can be effective only when it is properly educated. Native peoples regard the provision of resources for proper education as part and parcel of the special legal relationship with the United States.

This paper is not so much about Native education as it is about Native government. The recommendations to be made are quite simple. Congress must continue to support the authority of Native governments to control and regulate Native education provided through federal, tribal, and public schools on reservations. In a setting outside Indian Country, control of Native education must remain in the hands of Native parents. And, Congress must provide the financial resources to achieve these goals. History has provided clear evidence that Native education can only be a success when Natives control Native education. And finally, Congress must provide Native governments with the legislative tools to achieve these goals. Of what do these tools consist? They consist of new agreements described by Congress in its New Federalism Report. A century ago these agreements were called treaties: "We must promise the word of our nation once again by entering into new agreements that both allow American Indians to run their own affairs and pledge permanent federal support for tribal governments. Only by enshrining in formal agreement "The federal government's most profound promise that we will finally bury the discredited policies of forced tribal termination and Indian assimilation deep in their deserved graves" (New Federalism, p. 17).

Introduction

The education of American Indians and Alaska Natives has been pursued according to standards set by non-Natives since the arrival of the Europeans upon the North and South American continents. As exploration gave way to colonization, Europeans began to compete with Natives for the political, territorial, and economic dominance of the Americas. Initial treaty agreements seemed to indicate that Native governments and the Europeans would operate on a level of political equality. Convinced that their culture was superior to that of Natives, the Europeans felt that it was their moral duty to convert Native people intellectually, economically, and religiously.

The Spanish were the first to institute schools for Natives. Mission schools and colleges were established by the Jesuits throughout North and South America with the primary purpose of teaching Natives the Spanish language in order to convert them to Christianity. The Spanish founded the first school for Natives in 1523 in Mexico where 1,000 Native boys learned reading, writing, arithmetic, vocational trades, and the catechism (Williams, Bartlett & Miller, 1958, pp. 210-211).

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The British began permanent settlement of North America in 1607 with the establishment of Jamestown, Virginia. During British colonization, the churches and a few concerned individuals promoted the cause of education of the Natives sporadically during the 17th and 18th centuries. Few Native children availed themselves of the opportunity, however, because what was taught was not relevant to their needs (Fletcher, 1888, p. 34).

The United States government followed a similar pattern of controlling the content and administration of the type of education that Natives needed. The goals were largely the same as those established by the Spanish and the British which were assimilation and Christianization (United States Congress, American Indian Policy Review Commission, Task Force Five, Report on Indian Education, 1976, p. 28; hereinafter cited as AIPRC Education Report, 1976). The pattern of external government determination of Native people's educational needs remained the hallmark of Native education until the 1970s. The results of these formal efforts by European and American societies to educate and "civilize" American Indians have been devastating — so much so that a special Senate Subcommittee on Indian Education proclaimed the state of Indian education to be a "national tragedy." (U.S. Senate, Special Subcommittee on Indian Education, *Indian Education: A National Tragedy — A National Challenge*, S. Report No. 91-501, Committee on Labor and Public Welfare, hereinafter cited as National Tragedy, 1969).

As we look back over the history of the white society's conceptualization of "Indian education," it becomes clear how and why the efforts and the great amount of tribal funds and federal tax dollars that have been devoted to the purpose of Native education have had so little positive effect. Those who governed Native education never provided a role for the Natives to determine how they were to be educated. With the passage of the Indian Education Act in 1972 the U.S. Congress demonstrated that it could learn from the mistakes of the past and use this knowledge in building a foundation for the future. The most essential element in this foundation is the recognition of the necessity for Native participation in the control of Native education. The treaty guarantee of Native self-government means that it is the American Indian and Alaska Native conceptualization of education that must guide the future course of Native education, see *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976) and *EEOC v. Cherokee Nation*, 871 F. 2d 937 (10th Cir. 1989).

Historical Basis for the Government-to-Government Relationship

The government-to-government relationship is one of the common names for the fundamental concept which guides the relationship between the United States and Native governments. It is a simple term for the complex political and legal relationship that has evolved between Native governments and the federal government. Its origins begin over five hundred years ago (Public Papers of the Presidents of the United States, Ronald Reagan, Statement of Indian Policy, January 24, 1983, pp. 96-100).

Medieval Europe was beginning a trade with Asia. The rise of the Ottoman Empire, the defeat of a crusader army at the Battle of Varna in 1444 which confirmed Ottoman control in Europe, and the capture of Constantinople in 1453 and its establishment as the Ottoman capital of Istanbul set the stage for a European voyage to the West. Europe could still trade with Asia after 1453, but the merchants of Europe wanted to establish trade with China and Japan that did not have the extra cost of an Ottoman tariff (Ferguson, 1962, p. 407; Thompson, 1931, pp. 376-377).

The Portuguese had made a great success of their trading efforts along the west coast of Africa by 1460 and had reached the Cape of Good Hope at Africa's southern tip. They were ready to move on to India by 1488. It was shortly after this date that Columbus convinced Spain's monarchs to sponsor his voyage. When Europeans "discovered" the existence of America, it raised questions about how to deal with the new lands and new peoples.

The Aboriginal Rights of Native People

Out of the many by products of Columbus' voyage, we are concerned with the one specific question raised by the Europeans' discovery of the existence of a land mass between Europe and Asia: What is to be the relationship between the inhabitants of the Americas and the people of Europe?

The Emperor of Spain called on a lawyer to advise him about the rights of the "Indians" in 1532. Some of the Emperor's advisers had suggested that the Natives of the Americas had no rights at all since they were not Christians. Francisco de Vitoria, theologian and jurist, rendered his legal advice and told the Emperor of Spain that there could be no change in the ownership of land in the Americas or change in the independent political status of nations in the Americas unless

the Natives gave their consent. The Doctrine of Discovery, Vitoria advised, applied only where land was ownerless. Vitoria's advice set the stage for treaties to be negotiated between the European and Native nations (Cohen, L., 1960, pp. 230-252).

Vitoria's advice favoring Native rights and the opinions of his opponents who opposed Native rights set the foundation for what we know in the United States as Federal Indian Law. Across five centuries, we can measure the effectiveness of Native legal rights by the four leading principles established by Vitoria which follow:

- Political equality of the races.
- Tribal self-government.
- Central government control of Native affairs.
- Governmental protection of Native rights. (Cohen, L., 1960, pp. 240-247)

Vitoria's announcement that the Doctrine of Discovery did not apply because the lands were inhabited resulted in the Europeans developing a twist to "Discovery" to regulate competition among themselves (Cohen, 1972, p. 46). The theory that finally evolved said that "Discovery" gave first right to the discovering power to extinguish the ownership rights or title of the native inhabitants if the Natives wished to sell. This right of preemption settled the question of rights between the European powers, but not between the Natives and the Europeans (*Worcester v. Georgia*, 31 U.S. 515, 543-544, [1832]).

Britain, Spain, and France competed for control of North America, and each sought its own set of Native allies. Trade grew up in North America with the primary commodities supplied by the Natives being furs, fish, tobacco, and other agricultural products. The Europeans supplied guns, powder, woolen cloth and blankets, iron implements, and tools. Land soon became a focus of trade as Britain and Spain sought to establish colonies. Land acquisition by Europeans soon became a source of conflict with the Native governments. Britain consolidated its power in North America in 1763 by defeating the French in Quebec. The Crown asserted its authority over all Native affairs and Native trade. To solve trade conflicts with the Native governments, including trade in land, the Crown issued its Royal Proclamation of 1763 establishing the boundaries of Indian Country and confirming its policy of acquiring Native land by purchase.

This pattern of resolution of conflict by direct negotiation between the Native governments and the non-Native governments and recognition of the governmental authority of Native governments is the government-to-government relationship. The treaty documents formalized the government-to-government relationship (see Kappler, *Laws and Treaties*, Vols. I-VII). In the present day, numerous statutes implement this relationship and assign the primary duties for its conduct to the Bureau of Indian Affairs, U. S. Department of the Interior.

The Constitutional and Legal Basis of the Trust Responsibility and Fiduciary Relationship of the United States with Native Governments

All of the colonial powers recognized the sovereignty of Native nations and had entered in numerous treaties with Native governments. As the American Revolutionary War came to a close, the newly formed United States government, operating under the Articles of Confederation, had to deal with the issues of land ownership. When the United States won the Revolution it was suggested that the land of tribes which had sided with the British be treated as subject to the Doctrine of Conquest. Secretary of War Knox pointed out the difficulties and options that faced Congress on May 22, 1778, when he provided the following information:

1. The tribes were disgusted with conquest.
2. The British practice had been to purchase the right of the soil from the Indians.
3. The pursuit of conquest would mean continuous warfare which the United State could not afford (the Treasury was empty).
4. The purchase of the land by treaty would be the least expensive course (Mohr, 1933, pp. 132, 219).

Congress decided to discard the fiction of "Conquest" and appropriated funds to proceed with the extinguishment of Native land claims by purchase. Although "Conquest" is a popular notion about the acquisition of Native land, it is not the primary process through which the United States acquired Native land (United States Indian Claims Commission, Final Report, 1979, p. 1).

One of the failings of the government of the United States under the Articles of Confederation was the lack of clarity about the powers of the central government. Under the U.S. Constitution, the conduct of Indian affairs was committed to the federal government (Kickingbird & Kickingbird, 1987, pp. 23-24). The Commerce Clause and Treaty-Making Clause of the U.S. Constitution coupled with the decisions in two important

Cherokee cases decided by the U.S. Supreme Court form the legal basis for the guardian-ward relationship between the U.S government and the sovereign Native governments (Cohen, 1972, p. 170).

The legal theory holds that when the tribes took the protection of the United States through treaty, the Native governments relinquished use of their *external sovereignty*. Many tribes ceded vast quantities of land to the United States and agreed to no longer conduct treaty negotiations with any nation other than the United States in exchange for rights to continue to exist in a peaceful state under the protection of the United States and in exchange for goods and services to be provided by the United States. The United States, on its part, committed itself to fulfill treaty terms and protect the property and rights of the Native governments. This protection of property rights carries with it trustee responsibilities. The tribes retained *internal sovereignty* as self-governing, independent Native nations that dealt with the United States through teaties as all other nations of the world. Many tribes negotiated multiple treaties with the United States as time passed and circumstances changed.

One of the clearest expressions of Vitoria's principles for the relationship between the Native governments and the United States was contained in the Ordinance of July 13, 1787, (1 Stat. 52) defining government for the territory of the United States Northwest of the River Ohio, Section III:

> The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, from time to time shall be made for preventing wrongs being done to them, and for preserving the peace and friendship with them. (Kappler, 1929, Vol. IV, p. 1153)

The Doctrine of the Law of Nations applied to the Native governments was first set forth in the U.S. Supreme Court decisions involving the Cherokee cases (*Cherokee Nation v. Georgia*, 30 U.S. 1 [1831] and *Worchester v. Georgia*). The state of Georgia was attempting to assert jurisdiction over the territory of the Cherokee and the Court determined that:

- States have no jurisdiction within the Indian Country.
- Native governments are "distinct, independent, political communities,"
- The relationship between the Native governments and the United States resembles that of a guardian to a ward.

Tribal Sovereignty

All of the colonial powers, and later, the United States recognized the sovereignty of Native nations by entering into over 800 treaties with the Natives. Under international law, treaties are a means for sovereign nations to relate to each other (Kickingbird, Kickingbird, Chibitty & Berkey, 1977, p. 6). In 1762 three Cherokee chiefs carried out a diplomatic mission to London which resulted in an English-Cherokee Treaty in 1763. One of them was Outicite, or Mankiller, who was often a guest of Thomas Jefferson's father (Kickingbird & Kickingbird, 1987, p. 19). (Wilma Mankiller, in 1987, was elected as the first woman chief of the Cherokees in Oklahoma.)

The fact that Europeans and the United States made treaties with Native goverments demonstrates that they recognized the sovereignty of Native governments. In *Worcester v. Georgia*, the United States Supreme Court said that "... the very fact of repeated treaties with them recognized (the Natives' right to self-government) and the settled doctrine of the law of nations is that a weaker power does not surrender its independence — its right to self government — by associating with a stronger, and taking its protection," 31 U.S. 515, 559-61 (1832).

The power of Native governments to wage war was pointed out by the Supreme Court on several occasions as evidence of their sovereign character. See for example, *Montoya v. U.S.*, 180 U.S. 269 (1901); *Marks v. U.S.*, 161 U.S. 297 (1896). And, when critics complained that Native governments were not "nations" in the European sense, the Court responded that:

> The words "treaty" and "nation" are words of our language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are applied to all in the same sense. (*Worcester v. Georgia*, 31 U.S. 515, 559 [1832])

While the exercise of sovereign powers by Native governments has been restricted to some extent by the terms of treaties and statutes passed by Congress to carry out those treaties, there can be no doubt that the United States and other nations have recognized the inherent sovereignty of Native governments and their right to self-government (Cohen, 1942, *Handbook of Federal Indian*

Law, p. 122; U.S. Department of Interior, Solicitors Opinion, 1934, *Powers of Indian Tribes*, p. 55 I.D. 14).

Consequently, we know Native governments are sovereign because:

- Native goverments tribes feel they are sovereign.
- Native governments have exercised sovereign powers.
- Other nations have recognized the sovereignty of Native governments.

The distribution of governmental powers between the federal government, on the one hand, and the original 13 states, on the other, was made in the United States Constitution. The states delegated certain powers to the federal government and retained others. Included in this delegation was the power of the central or federal government to control Native affairs and to make treaties and regulate commerce with Native governments.

The distribution of governmental powers between the United States government and each Native government was somewhat similar. Over the decades and for various reasons, each tribe granted certain of its sovereign powers to the United States government in exchange for certain benefits and rights. This was done by treaty, agreement, or statute.

Whatever powers the federal government may presently exercise over Native goverments, are delegated to the United States in an on-going trust relationship from the Native governments themselves. The point to remember is that all of the powers were once held by the Native governments, not the United States government (Kickingbird, et al., 1977, pp. 7-8).

Treaty Rights

Exercising their sovereign powers, the Native governments entered into numerous treaties with the United States. These early treaties usually dealt with military, political, or economic alliances. Treaty terms addressed a wide variety of subjects. The negotiation of treaties spoke to the issue of self-governance by the Native nations. All of these treaties have been supported by various pieces of federal legislation from the beginning of the United States government down to the present day.

Educational Provisions of Treaties

Under the British colonization, the churches and a few concerned individuals promoted the cause of education of Natives sporadically during the 17th and 18th centuries. In 1691, the bequest of the Honorable Robert Boyd announced that "the Christian faith be propagated amongst the Western Indians." The money went to William and Mary College to provide schooling for Native boys in the area of reading, writing, arithmetic, and the catechism and to supply them with "fittings and furnishings" while they attended school (Kickingbird & Kickingbird, August, 1979, pp. 14-15). However, only a few Natives were ever allowed admission to the college (see Commissioned Paper 17, Wright, 1991 of the Supplemental Volume).

Some fifty years later, during the signing of the Treaty of Lancaster between the Government of Virginia and the Six Nations of the Iroquois Confederacy, the Virginia commissioners offered to educate six Seneca young men in the College of William and Mary. The attitude of the Natives toward the white men's education is well stated in the following response by one of the chiefs:

> We know that you highly esteem the kind of learning taught in those colleges ... But you, who are wise, must know that different nations have different conceptions of things; and you will, therefore, not take it amiss if our ideas of this kind of education happen not to be the same with yours. We have had some experience of it. Several of our young people were formerly brought up at the colleges of the northern provinces; they were instructed in all your sciences; but when they came back to us they were bad runners, ignorant of every means of living in the woods, unable to bear either cold or hunger, knew neither how to build a cabin, take a deer nor kill an enemy, spoke our language imperfectly; were therefore neither fit for hunters, warriors nor counselors; they were totally good for nothing. We are, however, not the less obliged by your kind offer, though we decline accepting it; and to show our grateful sense of it, if the gentlemen of Virginia will send us a dozen of their sons we will take great care of their education, instruct them in all we know, and make men of them.

Some of the northeastern tribes began to see a need for education, however. As a result of a Mohegan Chief's request to the Continental Congress for teachers and instructors in milling and tilling of the soil, the Congress, on July 12, 1775, appropriated $500 for the education of Indian youth at Dartmouth College in New Hampshire. Some years later, Cornplanter, a Seneca Chief, asked President Washington for instruction for his people in the area of ploughing, milling, and smithing and in the 3Rs. Washington, through his Secretary of War, responded warmly to Cornplanter's request by saying that either at the

time of treaty negotiations or at another convenient time formal arrangements would be made to impart "the blessing of husbandry and the arts" to the Senecas. Although Cornplanter's request was never fulfilled, the concept of educational provisions in treaties aroused interest.

The first Indian treaty of the United States was between the Delawares and the Continental Congress of the United States, signed in September of 1778. It established the legal interaction between Native governments and the federal government that was followed for almost a century (AIPRC Education Report. 1976, p. 29). It was a treaty of alliance between the United States and the Delaware (Kappler, 1929, Vol. II, p. 3). Article II provided for a mutual military defense pact between the two parties.

An important aspect of this treaty was Congress' view of the status and stature of the Native governments. The treaty provided in Article IV that the Delaware and other tribes allied with the United States could form a state and send a delegate to Congress. Article V of the Delaware Treaty focused on the need for a "well-regulated trade." It was well-known that cheating traders had caused more than one Indian war on the frontier. Article VI guaranteed the "territorial rights" of the Delaware.

Thirteen treaties later, the first educational provisions were included in Article II of the Treaty of December 2, 1794, between the United States and the Oneida, Tuscarora, and Stockbridge Indians whereby the United States agreed to provide a person to "instruct some young men of the three nations in the arts of the miller and sawyer, and to provide teams and utensils for carrying on the work of the mills" (7 Stat. 47). Eventually, 95 other Indian treaties signed over a period of 80 years provided education-related services to tribes.

In 1803, additional educational provisions appeared in the Treaty with the Kaskaskia. Under the treaty, the United States agreed to pay $100 annually to support a Catholic priest "to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature" (7 Stat. 78). One year and two treaties later, in the Treaty with the Delawares signed on August 18, 1804, a "civilization" program was funded providing $300 for ten years. Included in the civilization process was the teaching of fencemaking, cultivation and "such domestic arts as are adapted to their situation" (7 Stat. 81). These examples are obviously the foundation for the tradition that Native education must be conducted at bargain rates.

Although the heart of most of the treaties which followed dealt with cessions of land by Native governments to the U.S. federal government, education soon became an important adjunct to accomplish the task. Since Natives needed such large tracts of land to hunt, it soon became apparent that the only way they could be restricted to small land areas would be to turn them into farmers. Thus, working hand in hand, first with the Catholic Church and then with the many Protestant churches whose goals were to "Christianize the heathens," the U.S. Government began to develop and implement plans for the mass "civilization and Christianization" of Natives. The only separation in which the Church and State appeared to be concerned was that of Natives from their land.

Congress passed the Trade and Intercourse Act of 1802 which included the first formal statutory provision for federal responsibility for education. Although the treaties of the decade and a half between 1804 and 1818 did not contain educational or civilization provisions, the idea had become entrenched.

On March 3, 1819, the Congress passed an Act establishing the "Civilization Fund" (U.S. Statutes at Large, Vol. 4, 516) which appropriated an annual sum of $10,000 for the purpose of "providing against the further decline and final extinction of the Indian tribes adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization ..." This act became the chief legislative foundation for Indian education until it was repealed by the Act of February 14, 1873. Through this Act, the United States assumed general responsibility for the "civilization" of Natives without reference to treaties or treaty-related responsibilities with the intent of assimilating Natives into mainstream society (AIPRC Education Report, 1976, p. 34).

"Education" and "civilization" were early aspects of the federal government's Indian policy. In 1832, when Congress established the position of Commissioner of Indian Affairs under the Department of War, Indian education became a responsibility of the new Commissioner. The common attitude on the part of the early Indian Commissioners is shared by Commissioner Crawford T. Hartley in a statement written in his annual report in 1838: "The principal lever by which the Indians are to be lifted out of the mire of folly and vice in which they are sunk, is education."

Another justification for educating Natives was presented by Commissioner William Medill in his Annual Report of 1847. In it he says,

> While tribes remain in the aboriginal or hunter state there can be no just or adequate appreciation among them of the practical use of letters. Agriculture and the mechanic arts serve to awaken a new interest, by teaching them the true relations they bear to each other and to the civilized community around them.

But in 1850, again in support of manual labor training, Commissioner Luke Lea perhaps put the policy in a truer perspective when he said that Indians must "resort to agricultural labor or starve." Manual training schools were well-entrenched by the middle of the century. As early as 1848, 16 manual training schools serving 800 students and 87 boarding schools serving about 2,900 students were operating with support of the various churches and a little acknowledged group, the tribes themselves from their own treaty monies. In fact, the tribes and the churches were paying for a considerably larger portion of the total cost of Indian education than was the federal government. The statistics from as early as 1825 verify this fact.

The tribes continued to contribute large amounts to the building of schools and the hiring of teachers throughout most of the 19th century. The Commissioner of the Indian Office openly recognized this fact in 1849 when he said, "nearly the whole of the large amount required for the support and maintenance of the schools now in operation is furnished by the Indians themselves out of their national funds." He went on to recommend that the $10,000 appropriated by the Act of 1818 be increased to $50,000 in order to realistically accomplish the goals of education among the Natives. By 1855, the aggregate amounts spent on education were $102,107 by the U.S., $824,160 appropriated and accumulated from Indian funds, and over $400,000 paid out by the Native governments among themselves and from individuals and churches, for a total exceeding $2,150,000 (Kickingbird, K. & L., September, 1979, p. 16).

Authority of Congress

The authority of Congress over relations with Native nations on behalf of the United States is established by the Constitution. Congress was delegated authority by the states to regulate trade and enter into treaties with Native governments. Congress also has the authority to aborgate a treaty. "Unquestionably a treaty may be modified or abrogated by an Act of Congress, but the power to make and unmake is essentially political and not judicial" (*Old Settlers v. U.S.* 148 U.S. 427) (Kappler, 1929, p. 1153).

The Supreme Court described the authority of Congress over Native relations as "plenary authority," or near absolute authority in *Lone Wolf v. U.S* (187 U.S. 553).

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one and not subject to be controlled by the Judicial Department of the Government.... But, as with treaties made with foreign Nations the Legislative power might pass laws in conflict with treaties made with the Indians. (*Thomas v. Gay*, 169 U.S. 264-270; *Spaulding v. Chandler*, 160 U.S. 394.)
>
> The power exists to aborgate the provisions of an Indian treaty, through presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and Indian themselves, that it should do so. (Also see *Conley v. Ballinger*, 216 U.S. 84; *Super v. Work*, 55 App. D.C. 149). (Kappler, 1929, p. 1153)

Congress may enter into a treaty that supersedes a prior Act of Congress; enact law to supersede a prior Act of Congress; or enact law to supersede a prior treaty (*Patterson v. Jenks*, 2 Pet. 216; Kappler, 1929, p. 1153).

Congress has plenary authority in relations with Native governments — on behalf of the United States. This simply means that Congressional authority in relation to Natives governments is superior to the authority of state and local governments since such authority was delegated by the states to Congress in the Constitution. But the plenary authority is limited to the United States side of the relationship with Native governments. On behalf of the Native governments, Congress can exercise only that authority which Natives governments themselves have delegated to it by treaty. And, of course, the ability to exercise plenary authority and aborgate treaties is available to both parties of the treaty. Plenary authority of Congress does not extend to matters involving the *internal soverignty* of Native governments. Authority delegated by the tribes to the United States in the trust relationship through treaty can be withdrawn by the tribes. Therefore, tribal governments also enjoy plenary authority in relations with the United States — on behalf of the tribes — to the extent that tribal members authorize the tribal governments to act on their behalf.

After the so-called "termination" of tribes by acts of Congress in the 1950s and early 1960s, some states attempted to exercise control over the Na-

tive lands of the terminated tribe. The state of Wisconsin argued that the treaty rights of the Menominee did not survive the Congressional termination of federal trust relationship with the Menominee Tribe. In the case of *Menominee Tribe v. United States*, 391 U.S. 404 (1968) the Supreme Court held that the 1953 Act only terminated federal responsibility to the tribe, but did not affect the tribe's hunting and fishing treaty rights. The tribe and the treaty rights survived the termination Act of Congress. Through termination of the trust relationship, Congress could politically decide not to be a trustee, but Congress could not revoke fishing and hunting rights retained by the tribe nor affect the status of the tribe as a sovereign nation.

In *Kimball v. Callahan*, 590 F2d 768 (9th Cir. 1979), the 9th Circuit Court of Appeals determined that Klamath Indians who were not enrolled or had withdrawn for the tribe as a result of the 1961 Klamath Termination Act nevertheless retained their treaty rights to hunt and fish within the former Klamath Indian Reservation free of state regulation based upon a treaty signed October 14, 1864 between their tribe and the United States (16 Stat. 707). The termination Act did not abrogate tribal treaty rights for hunting, fishing, and trapping, nor did it affect the sovereign authority of the tribe to regulate the exercise of those rights. The Supreme Court refused to review this opinion thereby making the decision of the 9th Circuit final (Cert. denied No. 78, 1538 48 U.S.L.W 3205). Congress cannot dissolve tribes, adversely effect the inherent rights and sovereignty of tribes, or overpower tribal rights to Native lands, property, and unrestricted enjoyment economic and tribal activities reserved by tribes in treaties with the United States. The notorious termination acts could only withhold from the tribes the services and obligations promised on the part of the United States in the treaties that established the trust relationship. Congress can break treaties but not tribes.

The Historical Role of Churches in Native Education

Since the missionaries of numerous protestant and Catholic sects took upon themselves the responsibility of bringing civilization and Christianity to Native people, the government did not play an active role in Native education until the 1870s. Following the pattern established in the 18th century and the early 1800s, the churches established schools and in many cases built school houses and dormitories. Grants were made by the government directly to missionaries on behalf of individual tribes and schools.

There was no clear distinction between the separation of Church and State with respect to Native education in the early days. In fact, the government negotiated with the various sects and divided the country into jurisdictions. Generally, the division was made along these lines: the Baptists and Methodists were assigned the South and Southern Plains, the Episcopals and the Catholics were assigned the Great Lakes Region and the Northern Plains, and the Presbyterians were assigned the Southwest where the Catholic Church had already made an impact during the Spanish invasions of Mexico and the Southwest.

Responding to the large outlay of funds and effort on the parts of the various Christian denominations, the Secretary of the Interior in his Report of 1865 recommended the following:

> That Congress provide a civilization and educational fund, to be disbursed in such a mode as to secure the cooperation and assistance of benevolent organizations ... It is believed that all the Christian Churches would gladly occupy this missionary field, supplying a large percent of the means necessary for their instruction, and thus bring into contact with the Indian tribes a class of men and women whose lives conform to a higher standard of morals than that which is recognized as obligatory by too many of the present employees of the government. (Report of the Indian Commissioner, 1865, p. iv)

It was not long, however, before it became clear that Christianization would not necessarily lead to the assimilation of Natives into the lifestyle of the mainstream society. As more and more Europeans immigrated to this new land, the need for new lands to settle on increased. The Americans became impatient. They wanted instantaneous conversions of Indians to an agrarian "civilized" life.

Federal Control of Native Education

So it was that during the last three decades of the 19th century, the federal government played a much more active role in Native education. This activity began in 1869 with a recommendation from the Board of Indian Commissioners that schools be established and "teachers be employed by the government to introduce the English language in every tribe." To accommodate the activities arising from the increase in concern and the expansion of Native education programs, the Act of July 15, 1870, provided for the appropriation of $100,000 to support "industrial and other

schools among the Indian tribes not otherwise provided for" (16 Stat. 359).

The federal Indian school system grew rapidly. In 1877, the Indian Commissioner proposed "the establishment of the common school system (including industrial schools) among the Indians, with provision for their compulsory education in such schools" (Report of the Indian Commissioner, 1877, p. 1). This emphasis on compulsory attendance would mean that much more money would have to be appropriated to meet needs or that the existing schools would soon become extremely overcrowded. Overcrowding was the solution that the government chose. In the same year, the Indian department was established at Hampton Institute, Hampton, Virginia. In 1878, the training facility for Indians at Carlisle, Pennsylvania, was founded. After the beginning of World War I, the Carlisle school was moved to Lawrence, Kansas, where it became Haskell Institute in 1917. Haskell Institute maintained a military discipline and a climate of deculturation of Native youth to non-Native life (Lynch & Charleston, 1990, p. 2). Today, Haskell is operated by the Bureau of Indian Affairs as Haskell Indian Junior College.

The government was slowly but surely reducing its support of the missionary schools. While not discouraging their existence or expansion, government officials set out to chart a different course for Native education through the federal school system. The position of Superintendent for Indian Education was established by an Act of Congress, May 17, 1882. And, within five years, a full-fledged department of education was developed. According to the Regulations of the Indian Department, the general educational policy was to teach Native students reading and writing in the English language, fundamental arithmetic, geography and United States history, and to instruct them in farming, livestock, and domestic chores.

By 1885, there were 7,433 Indian youngsters being educated in 177 government boarding, day, and training schools. The personnel in the schools consisted of 7 superintendents, 1 superintendent-general instructor, 111 teachers, 26 teaching assistants, 25 teacher-principals, 22 teacher-superintendent-principals, and 5 Native teachers.

The federal schools soon became very overcrowded and lacked instructional materials and books. The lack of materials and supplies was not made up until the middle of the 20th century. Most of the existing buildings were poorly constructed and designed and did not accommodate the large increase in school populations.

The passage of the Act of July 31, 1882, was meant to ameliorate the overcrowded and inadequate building conditions (22 Stat. 1811). This Act authorized the Secretary of War to set aside unused military installations, forts, and stockades for the purpose of Native education and to detail one or two Army officers for duty in connection with Native education. With the setting up of the fortress-like schools the attitude of the government toward Native education became sterner. These were the times of the Indian wars of the late 1800s — and some very successful victories for the Indians.

Towards the last half of the 1880s, the general public began to question the large expenditure and low results of the Office of Indian Affairs' education programs. For the first time, part of the blame was placed on the teachers and administrators of the Indian schools, many of whom were political appointments. In 1888, Commissioner John H. Oberly, who had formerly been Commissioner of the Civil Service Commission, made a major policy change in the hiring practices of teachers for the Indian service. Having come fresh from the Civil Service Commission, Commissioner Oberly was anxious to bring some of his experience with him to the Indian Office. He hypothesized that if teachers were civil servants, they would not have other loyalties and, therefore, would be more effective teachers.

Commissioner Oberly's good intentions were not as successful as he had hoped for two reasons. First, the appropriations were never increased significantly to attract higher caliber teachers and administrators. Second, many of the existing teachers took the civil service test and passed. Moreover, no one questioned whether scoring highly on the standard civil service test meant that a person was a good teacher of Native children. Frequently, the result of the new policy was that the teachers had no loyalties at all.

Another major policy which was discussed during the period when the federal school system was being fully developed was the eventual turnover to the States of the responsibility for all of Native education. **It was thought that true assimilation would be achieved when Native children could learn as well in public schools as white children. It would also be cheaper for the government if it were not required to maintain the federal school system for Indians** (Kickingbird, K. & L., September, 1979, p. 19).

Congress Ends Treaty-Making

In 1871, many tribes were engaged in active war with the United States over land, natural resources, and the right of tribal independence and

self-government. It was five years before "Custer's Last Stand" and 19 years before the massacre at Wounded Knee. Under the Constitution, treaties are ratified by the Senate. The House of Representatives rebelled their exclusion from the ratification process for important treaties with the tribes by refusing to pass appropriations bills. With a rider to an appropriations bill, the Act of March 3, 1871 (16 Stat. 566, 25 U.S.C. § 71 (1976), ended treaty-making with Native nations. The Act is important today because its intent was to legalize assimilation of tribal people and allow the annexation of their lands. The Act specifies that:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired. (Act of March 3, 1871)

Indeed the issues involved between the tribes and the United States were similar to the ones between Kuwait and Iraq; but, there was no United Nations to protect the tribes in 1871. During the debate on the bill, Senator Eugene Casserly of California said:

> ...[Tribes] hold great bodies of rich lands, which have aroused the cupidity of powerful corporations and of powerful individuals....I greatly fear that the adoption of this provision to discontinue treaty-making is the beginning of the end in respect to Indian Lands. It is the first step in a great scheme of spoliation, in which the Indians will be plundered, corporations and individuals enriched, and the American name dishonored in history.

The result of the Act was a shift from treaty-making to that of Congress making "Agreements" with the Native goverments which were ratified by both the Senate and the House. The Supreme Court held that these agreements were equivalent to the earlier ones known formally as treaties. The Act had little practical effect on Native-United States relations. But, in the mind of American citizens, it clouded the status of Native nations by asserting that Congress would no longer acknowledge or recognize Native governments as independent nations. The effect of this Act still clouds the understanding of the relationship between Native nations and the United States. It should be repealed.

Tribal Self-Determination, Self-Governance and Self-Sufficiency

The very process of treaty-making confirmed that Native people had governments by which to govern themselves. The young United States viewed these governments as so effective that Congress went so far as to offer Native governments representation in Congress: Article VI, Delaware Treaty of 1778; Article XII, Cherokee Treaty of Hopewell, 1785; Article XXII, Choctaw Treaty of Dancing Rabbit Creek, 1830.

Farmer, ranchers, railroads, and politicians coveting Native land and natural resources found it easy to portray Native peoples and their governments as ignorant, inferior, and ineffective. The federal policies of the latter half of the 19th century found little recognition of the right of Native self-governance. Through the federal Indian schools, the assimilation policies, and the General Allotment Act, the United States government set out to suppress or dismantle the tribal governments (Cong. Rec. 59th Cong., 1st Sess., pp. 3122, 5041).

In its efforts to terminate the Five Civilized Tribes, the U.S. government found itself negotiating agreements with these tribes about their future, thus, recognizing their right to self-government. In 1906, as legislation was about to terminate the Five Civilized Tribes, Congress became aware of what it was doing and passed legislation to continue to recognize the governments of the Five Civilized Tribes (*Harjo* case, p. 1129).

The Bureau of Indian Affairs proceeded to operate as though the governments had been terminated and controlled all aspects of the lives, property, schools, and government of these tribes. Seventy years later a federal judge characterized the Bureau of Indian Affairs conduct, which was without any statutory authorization, as "bureaucratic imperialism." In this 1976 decision, the federal courts stopped the interference of the Bureau of Indian Affairs in the control of the Creek government in part because of an 1867 treaty between the Creeks and the United States which guaranteed them self-government (*Harjo* case, p. 1130).

A 1907 Supreme Court case, *Quick Bear v. Leupp*, 210 U.S. 50 (1907), acknowledged the rights of Natives parents and tribes to choose between religious and secular schools. Chief Justice Fuller proclaimed the right of an Indian nation to use its treaty funds for schools of its choosing. The exercise of educational choice by tribes would require parents and Native nations to participate in

making policy which provides a range of options. It required informed professionals who could elaborate the choices and provide rationale for them. The opportunity for Native nations to exercise choice lay dormant for over 60 years until federal control of Native education was relaxed by self-determination legislation (Lynch & Charleston, 1990, p. 3).

Jurisdictional Conflicts between State and Tribal Governments

When the federal government was delegated the authority to control relationships with the Native governments under the Commerce Clause of the U.S. Constitution there was no role for the states. The special political relationship between the United States government and Native governments established by treaties has been emphasized and de-emphasized over two hundred years of policy-making. At one time, Indian affairs was as important to the United States as foreign affairs because a sound political relationship with the Native governments was the vital link to the continued existence of the United States government. That vital political link received less emphasis once the independence of the United States was achieved after the War of 1812 (Morison, 1965, p. 333).

By 1830, the concern of the states and their citizens was that tribal governments possessed choice farm lands and resources within what the states contended was their boundaries or within the boundaries of lands the state wished to acquire. The consequence was an ongoing political rivalry between the states and the Native governments that continues down to the present day (*Oklahoma Tax Commission v. Citizen Band Potawatomie Indian Tribe of Oklahoma*, No. 89-1322 [February 26, 1991] 59 LW 4137).

One of the byproducts of that rivalry was adverse social conditions for the tribes as they were pushed out of original homelands or as they were pressed to reduce the size of their land holdings. The constant assault on the power of Native governments and their land holdings which culminated in the General Allotment Act of 1887 prevented the tribes from establishing or maintaining a sound economic base (AIPRC Final Report, 1977, pp. 64-69).

The tribes' constant fight for survival through the nineteenth century and through much of the twentieth century diminished the economic resources the Native governments might have devoted to social programs including education. In those instances when tribes were able to maintain educational systems which they operated and controlled, they achieved admirable results. The Cherokee achieved 90 percent literacy through tribal schools, the Cherokee syllabary, and Cherokee operated printing press (*National Tragedy*, 1969, p. 19).

Throughout these times of trial, one factor remained in place which dominated the early relationships with the United States government and proved to be a dominant factor as the twentieth century closed. This factor was the government-to-government relationship between the United States government and Native governments and the legal foundation on which it rests (U.S. Senate Special Committee on Investigations of the Select Committee on Indian Affairs, *A New Federalism for American Indians*, S. Rept. 101-216, 101st Cong., 1st Sess., Nov. 20, 1989, pp. 16-17).

The classic example of conflict between state and tribal governments is manifested in the 1830 Cherokee cases and the ruling that the states had no jurisdiction in Indian Country. The rule from *Worcester v. Georgia* (1832) that states had no jurisdiction in Indian Country remained in effect for the first hundred years.

Periodically the Supreme Court would remind the nation of the volatile relationship between the states and the Indian nations with remarks such those found in *United States v. Kagama* 118 U.S. 375 (1886), "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." As the 20th century opened, the states began to take a role in Indian affairs as the result of policies by the BIA to push Native children into public schools (Washburn, 1973, Vol. II, p. 868) and through special legislative grants of authority. The primary areas where states were granted a role was in education. Statutory authority was provided by Congress to enforce state school attendance laws, 25 U.S.C. § 231, and later other legislative authority was provided to induce state schools to accept Native students into the state school systems by providing special funding through the Johnson O'Mally (JOM) Act of 1934 25 U.S.C. § 452 et seq. (1934) and Public Laws 81-815 and 81-874, Impact Aid for Federally-Connected Children, 25 U.S.C. § 236 et seq. States were willing to accept the funding provided but resorted to all manner of excuses to avoid providing the services. Between 1970 and 1972, one federal audit of JOM funds found 80 percent of the questioned costs arising out of ineligible student participation (Office of Survey and Review, Interior Dept., 1973, p. 5).

Education was just one area in which Native governments and state governments found themselves in conflict. Arguments about jurisdiction,

land ownership, taxation, voting rights, water rights, and economic development all contributed to a climate of conflict between the governments. In recent decades, attempts to find common ground have been promoted through the idea of "tribal-state compacts," for example, the proposed Tribal State Compact Act of 1978 and the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (d).

The relationship of tribal members and the federal government arise in the political context of the government-to-government relationship. It is the Native governments with whom the United States has a trust relationship and citizens of the Native governments derive rights which flow through the Native governments. Native education legislation in the last three decades targeting services to Native students usually provides for participation of Native parents and Native community representatives as a surragote for participation of tribal governments in Native education, 25 U.S.C.§§ 2604 (b)(2)(B).

Even this Native parent representation has not been received cordially by the states or by the Bureau of Indian Affairs. But, through these measures, the federal government has provided a means to support Native parent participation and, hopefully, the means to overcome the failures of past Native education policy.

Issues of civil and criminal jurisdiction have remained sources of conflict between the states and Indian nations down to the present day. In the civil area, taxing authority has been a prominent topic of conflict through three decades, *Warren Trading Post (1965)*, *McClanahan* (1973), *Bryan v. Itasca County* (1976), and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S., 109 S.Ct. 1698 (1989). The cigarette tax cases have been particularly aggravating for tribes as seen in *Moe* (1976), *Colville* (1980), *Chemuevi* ( ), and *Oklahoma Tax Commission v. Citizens Band of Pottawatomie* (1991). The limitations on tribal regulatory authority in *U.S. v. Montana* (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* (1989) were disappointing to tribal governments. The limitation on tribal government criminal misdemeanor authority in *Oliphant v. Suquamish Indian Tribe*, 98 S.Ct. 1079 (1978) and *Duro v. Reina* (1990) have been distressing for tribes even though Congress limited the impact of *Duro* with legislative action and apparently intends to make the suspension of *Duro* permanent (137, Cong. Rec, April 9, 1991, p. 5 S136).

All of the relationships between tribes and the states have been affected by the long history of conflict and prejudice. Those conflicts have transpired between the states and the Native governments in both the criminal and civil arena of jurisdiction. Although the focus of the conflict is most prominently seen in the civil arena in the taxation and regulatory disputes, education can be affected by the taxation of materials used in the construction of a school run by a Native community in Indian Country, see *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982). Consequently, the adversarial attitudes will color almost all relationships between the state governments and Native governments.

Education Policies in the Twentieth Century

The first thirty years of the twentieth century saw the passage of such landmark legislation as the Snyder Act in 1921 ___ U.S.C. __, that directed the Bureau of Indian Affairs to provide services to Natives throughout the United States without regard to specific treaty provisions, and the Indian Citizenship Act in 1924 ___ U.S.C. __.

During this time, there was not much change in the effectiveness of the school systems serving Natives. In some areas, the federal school system tried to improve quality of new teachers and administrators. The qualifications criteria were raised for all school personnel, including the dormitory advisors, to include a four-year college education in addition to practical experience. The success of civil service criteria for Indian service personnel, however, became debatable. It was difficult to fire ineffective and insensitive teachers. Frequently, teachers who could not get jobs in state school systems found refuge in the Indian Service, and many had little experience in dealing with children of another culture.

In the beginning of the 1920s, there was a tremendous increase in the Native public school population. Appropriations were made by Congress to provide subsidies for the public schools which enrolled Native children, but the money was quickly expended each year, and many children were forced to attend local federal day and boarding schools. Perhaps one of the most encouraging realizations coming from this period in the history of Native education was that the attempts to educate Native youngsters met with more success when they went to schools (public or federal) near their home communities (Kickingbird, K. & L., September, 1979, p. 19).

Another enlightened concession soon came with the candid admission by Commissioner Charles H. Burke in his 1928 Report: "Experience has demonstrated that it is futile to try to make all Indians farmers and stock raisers. Many will not interest themselves in those occupations." He went

on to say, "It seems clear that the traditional school system of the whites is not immediately applicable in its entirety to the needs of Indian children" (Report of the Commissioner of Indian Affairs, 1928, pp. 5, 7). Strangely enough, the Indian military schools, those that were established at abandoned forts, were more successful than the regular schools ostensibly fashioned after the white educational systems. The reason for their success was their emphasis on individual responsibility. In these schools, Native students were given a rank and responsibility so that the absolute authoritarian figure of the teacher was minimized. The feeling of responsibility gained by their commissions and rank helped to build a positive self-image. When the need for discipline arose, the accused came before a court martial and was judged by a jury of peers, rather than a white overlord masquerading as a teacher who possessed neither knowledge nor mercy. Since warriors were given a place of prominence in many Native societies, training to be military leaders was an endeavor that seemed a worthy educational pursuit.

One of the most comprehensive reports on the status of Indian services was completed in 1928 by the Institute for Government Research (now the Brookings Institution). The report entitled, *The Problem of Indian Administration*, and popularly known as the Meriam Report, pointed up the inadequacies of the present educational system and made many suggestions for improvement. The following are findings of the staff of the study in regard to Indian boarding schools.

- The provisions for the care of the Indian children were grossly inadequate.
- The diet is deficient in quality, quantity and variety, and the great protective foods are lacking.
- The boarding schools are overcrowded materially beyond their capacities.
- The medical services for the children are below standard (true also for day schools).
- The boarding schools are supported in part by the labor of students.
- The Indian service personnel are poorly trained and inexperienced in educational work with families and communities.

The Meriam Report called on teachers and administrators of Native school children to change their point of view from that of trying to fit the Native student into the white educational mold to that of recognizing the individual needs of the student and adapting the curriculum to suit these needs. To achieve this, the following recommendations were made:

1. The Indian service should set up a unique set of educational goals, unlike those from the public schools.
2. The main educational objective (of the course of study) during elementary school should be changed from learning English to giving Indian children a reason and desire to learn.
3. To enhance the education of their children, a general adult education program should be established comprised of adults and children within the community.

The Commissioners of the next decade gallantly tried to implement the above recommendations, but the Second World War interrupted their progress.

Education in the New Deal Era

The rapid increase in the federal Indian bureaucracy through the expansion of its school system resulted in a substantial shift of power from the tribes to the career employees of the Department of the Interior. The bureaucrats' decisions and values prevailed against the tribal powers of self-government and decision-making responsibilities of the Indian communities. Congress made an effort to restore some balance to the power equation in passing the Indian Reorganization Act (IRA) of 1934. Indian tribes organized under the provisions of the IRA were recognized has having the powers of self-government. At the same time, Congress provided a means to shift responsibility for Native education to the states through the Johnson O'Malley Act (JOM) of 1934.

Indian Reorganization Act of 1934

Most tribal governments operating today were influenced and shaped by the Indian Reorganization Act (IRA) of June 18, 1934, (48 Stat. 984) (25 U.S.C. § 476). This Act, which is also known as the Wheeler-Howard Act, did not "give" a government to the tribe. They had been governing themselves for thousands of years. Rather, it reaffirmed that tribal governments had inherent powers which were officially recognized by the United States Government (Powers of Indian Tribes, 55 I.D. 14, 65 [1934]).

The IRA was enacted by Congress to correct the many destructive Indian laws enacted previously, and to provide for the "formalization" of tribal government through a written constitution and charter. The objectives of the legislation were summed up in the committee report, Senate Report

No. 1080, 73d Cong., 2d session, presented by Senator Wheeler, one of the co-sponsors of the measure:

1. To stop the alienation, through action by the government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support of these Indians.
2. To provide for the acquisition, through purchase, of land for the Indians, now landless, who are anxious and fitted to make a living on such land.
3. To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
4. To permit Indian Tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations.

The inherent powers of the tribe were supplemented with those conferred by Section 16 of the Indian Reorganization Act. It specifically states that these powers listed below are "[i]n addition to all powers vested in any Indian tribe or tribal Council by existing law ..." The power:

> To employ legal counsel, the choice of counsel and the fixing of fees...;
>
> to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands or other tribal assets without the consent of the tribe;
>
> to negotiate with the federal, State and Local government.

Section 16 also spells out certain obligations on the part of the Secretary of the Interior:

> The Secretary of the Interior shall advise such tribe or its tribal Council of all appropriation estimates or federal Projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

There are two other aspects of the Indian Reorganization Act that tribes thought important. The IRA contained provisions for loans for Native students to pursue their education at vocational and trade schools and in high school and college. The provisions for these loans appeared in the original legislative proposals and remained in the final statute.

During regional hearings to explain the proposed legislation which would become the Indian Reorganization Act, the Native government representatives were interested in the educational provisions. A representative of White Mountain Apache noted the importance of a university education when he asked, "Would that give these Indians the right to go to law schools and still hold their Indian rights, the right to take up tribal matters?" (Report of Southern Arizona Indian Conference, 1934, p. 15).

The Indian Reorganization Act contained provisions for Native preference in employment and, like the many other treaty and statutory provisions for Native employment preference, it was ignored by federal officials until the U.S. Supreme Court ruled in favor of the concept in *Morton v. Mancari*, 417 U.S. 535 (1974). Such employment preference and the role model Native teachers and administrator could have provided would have been a dynamic force in Native education.

The passage of the IRA and the leadership of John Collier as Indian Affairs Commissioner (1933-1945) affected Native education. Under the leadership of John Collier such innovative programs as bilingual education, adult basic education, higher education, student loans, and in-service teacher training for Native teachers in the federal school system in Native culture and life were begun. The number of boarding schools was reduced by 16, and 84 new day schools were added. The day school (both federal and public) population increased substantially.

The IRA provided Native people and tribes with an orientation to the type of political system and govenment structure of mainstream America. The new structure was considered carefully by most tribes; it was rejected by more traditional Native groups (Lynch & Charleston, 1990, p. 5).

Johnson O'Malley Act of 1934

For most of the first seventy years of the twentieth century views about the conduct of Native education did not deviate from the views that had prevailed for the previous five hundred years. The central government — Spain, Britain, the United States — controlled the conduct and set the standards of Native education. Reports from various studies after the turn of the century recommended a move away from the federal boarding school model. Such recommendations resulted in the passage of the Johnson O'Malley Act, 25 U.S.C. § 452 et seq. (1934), which was designed to provide financial inducement to the states to take Native students into the public school system.

It was a departure from past procedures in the realm of jurisdiction. The general rule from the Cherokee cases *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832), in the 1830s was and is that the states have

no jurisdiction and no role or responsibilities on Indian reservations or in Indian affairs including Native education. Because the states had no jurisdiction in Indian Country, they could not tax property in Indian Country for the purposes of generating revenues to pay for services such as education that they might provide to Native people, see *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982). The Johnson-O'Malley Act authorized the Secretary of the Interior to enter into contracts with states and territories (amended in 1936 to include "colleges, universities, and educational agencies") for the "education, medical attention, relief of distress, and social welfare of Indians and for other purposes." This Act enabled the government to reimburse state and local school districts for the education of Indian children. In other words, the Act succeeded in fulfilling the government's policy goal of turning over the responsibility for Native education to the states by providing funds as an inducement (Kickingbird, K. & L., September, 1979, p. 20).

The Johnson O'Malley Act provided contract authority and financial inducement for state school systems to assimilate Native children into the mainstream public schools. It merely shifted the locus of control from federal administrators to state administrators. It marked no change in the basic presumption that non-Natives should control the course of Native education. The Federally Impacted Areas Act in the 1950s and Title I of the Elementary and Secondary Education Act of the 1960s maintain the same standards of non-Native control of Native education through the present day.

It was clear that the federal government would continue to play a primary role in the funding of Native education because of the federal-Indian trust relationship, the statutes passed by Congress to carry out that relationship, and the federal funding required to execute the trust responsibilities in Native education. Native communities were concerned with the degree of control that the federal government would have in the educational arena to maintain their trust responsibilities (AIPRC Education Report, 1976, pp. 167-170).

The states were concerned about Native educational issues for their own reasons. The states first concern was about the loss of control over the federal dollars coming to them if there was a greater role in education for Native parents and Native communities. The states feared Native control of funding would lead to a greater political power for Native people and tribal governments.

The Termination Era

Historical Background of Termination

Beginning in 1928 with the publication of the Meriam Report, Institute for Government Research, *The Problem of Indian Administration*, and extending through the 1930s, federal policy and legislation (25 U.S.C. § 461 et seq.), strongly affirmed tribal sovereignty, and supported mechanisms which would assist tribes in strengthening their governments and institutions and consolidating their landbases which had been severely fragmented by allotment. After decades of broken promises, moral disillusionment, the ravages of disease, and abrupt changes in lifestyle, Native governments and their people were beginning to pick up the pieces and forge new self-determined futures. World War II put an end to the United States' spirit of commitment to Native self-determination and the reforms made during the 1930s.

While the war years marked a dormant period in Native-United States relations, the post-war years (late 1940s through the early 1960s) saw the development and implementation of a "new" policy which brought a halt to the development of tribal government for nearly two decades.

After World War II, in which many Natives fought valiantly for their country, the "era of enlightenment" ended with a crash. All the policies of the Collier administration were refuted and the idea that the only way Native children can learn was from totally non-Native oriented schools gained momentum.

Termination: An Old Policy with a New Twist

According to the 1944 House of Representatives Select Committee on Indian Affairs, "The goal of Indian Education should be to make the Indian child a better American rather than to equip him simply to be a better Indian (U.S. Senate, 1969, p. 14)." This reactionary idea developed and matured during the war years, and in the mid 1940s a new concept began to stir in Congress. It culminated in 1953 when the 83rd Congress passed House Concurrent Resolution 108 declaring U.S. policy for Indian tribes to be that of "termination." The real effect of the Concurrent Resolution was to make Native lands subject to property taxes and to eliminate the provision of services provided for in treaty agreements by the federal government, including health and educational services (Hoover Commission, *Report on Indian Affairs*, 1949). Natives had been guaranteed exemption from proper-

ty taxes principally by treaty or the General Allotment Act of 1887.

Termination was presented as a method of making Natives "first-class" citizens, even though they had been made United States citizens in 1924 (Act of June 2, 1924, 43 Stat. 253). By terminating the special trust relationship and a recognition of the sovereign status of Native governments, the United States government would be promoting the "assimilation" of Natives — socially, culturally, and economically — into the mainstream of American society. Through termination, Natives would be "given" the same rights and responsibilities of all other citizens, thereby making them "first-class" and "fully taxpaying citizens," (The Hoover Commission, Report on Indian Affairs, 1949).

Americans have always held close to their hearts the idea that this society is a "melting pot" where peoples from all over the world have come to make their fortunes and live happily ever after with each other. One does not have to visit many ghettos of large cities or the many rural enclaves of distinct ethnic groups which dot the land to know that the melting pot is more theory than fact. Nevertheless, the ultimate passage of House Concurrent Resolution 108 in 1953 affirming the terminationist policy towards Natives had as a basis this out-dated and uniquely American myth.

The report of the Hoover Commission, published in 1949, advocated complete integration into the mainstream society. With Native advocacy in the federal sector at a low point, this outlook quickly gained momentum. The Indian Commissioners appointed by both presidents Truman and Eisenhower were openly pro-termination. President Truman appointed Dillon Myer as Commissioner of Indian Affairs in 1950. He was the former director of the resettlement camps for the Japanese during World War II. Myer ended the progressive era of Collier and replaced it with a program that provided a low level of general academic preparation and relocation of Native people from Native communitites and reservations to the urban labor pool under the Relocation Act ___ U.S.C. ___. President Eisenhower appointed Glen Emmons as Commissioner of Indian Affairs to continue the termination and relocation work of Commissioner Myer (Lynch & Charleston, 1990, p. 5).

Certainly, some legislators sincerely believed that integration was both equitable and a desirable solution for the endemic problems encountered by the rural and isolated nature of Indian reservations. This concern, combined with the political realities of a newly elected and popular Republican president, Republican and conservative majorities in both Houses of Congress, and nationalistic postwar "Americanism" led to an easy passage of House Concurrent Resolution 108, 83rd Cong., 1st Sess. (1953).

Although a statement of policy only, HCR 108 was quickly followed by perhaps the most widely known and widely denounced federal Indian legislation in recent memory, the notorious Public Law 83-280 (Act of Aug. 15, 1953, 67 Stat. 388) that ushered in the "termination" phase of federal Indian affairs. Public Law 83-280, and subsequently many other pieces of legislation, terminated the special relationship between specifically named Indian tribes and the United States. It gave Wisconsin, Oregon, California, Minnesota, and Nebraska criminal and civil jurisdiction in Indian country and provided a mechanism whereby states could assume permanent jurisdiction over Native governments.

The statute also authorized other states to assume civil and criminal jurisdiction over Indian territory by making appropriate changes in their state constitutions or laws. In 1968, the law was amended to require the consent of Native governments before states could assume jurisdiction (25 U.S.C. § 1301 et seq.).

The termination era policies were in direct conflict with the existing body of Federal Indian Law that had been consolidated in 1942 by Felix S. Cohen in the *Handbook of Federal Indian Law*, a highly regarded legal reference. So, the BIA simply revised Chohen's book to delete or revise the objectionable sections and include new opinions to support their policies; they issued a new edition of Cohen's book without mentioning the changes. The original version was republished in 1972 (Cohen, *Handbook of Federal Indian Law*, 1972, University of New Mexico Reprint of 1942 edition).

The effect on Indian country can only be described as extreme psychic trauma and paralysis. The Menominees and the Klamath, two of the most economically advanced tribes, were among those selected for termination. The reward for their success was the penalty of destruction.

Over 70 Indian tribes and rancherias fell victim to the termination policy (AIPRC Final Report, 1977, p. 451). Again, there was short-sightedness on the parts of the federal government and states. Neither took into consideration the effect that the cessation of federal dollars to Natives would have on states nor the debilitating social burden which would become the states' responsibility.

The termination legislation that passed during this time grew out of the decentralization policy of the federal government and the shift of responsibility to the states. In much the same way as the

Johnson-O'Malley program came to be used, Public Laws 81-815 and 81-874, "Impact Aid for Federally-Connected Children," provided funds to public school districts to encourage enrollment of Native children who lived on or near a reservation (Kickingbird, K. & L., September, 1979, p. 21).

In 1951, Congress passed the Federally Impacted Aid Areas Act, 20 U.S.C. § 236 et seq., designed to assist school districts in which federal ownership of property reduced the tax base. Administration of the programs required the state school officials to choose either JOM or Impact Aid. In 1958, the Impact Aid law was amended to allow the state schools systems to collect both with Impact Aid directed toward basic support of the schools and JOM directed toward special educational needs of the Indian students.

The parents of Native children would have the opportunity to influence the operation of schools serving their children on the reservation as tribal citizens electing their tribal officials. Outside of Indian Country, the parents of Native children would have little influence about the educational programs serving their children because the non-Native population would be so large that Native parents would not even exist as a serious swing vote in school board elections.

Congress was able to appreciate the problem of Native parents' lack of political influence, the effects of the long history of conflict, and the desire of Native parents to participate in the processes affecting their children's education. Congress' response was to amend the Federally Impacted Areas Act to require the involvement of Native parents and tribes in planning, development, and operation of programs funded in the Education Amendments Act of 1978. In practice, these requirements have been largely ignored. The bureaucratic procedure for filing a grievance against a public school district with the Department of Education is so complex that as of 1990, the Office of Impact Aid has acknowledged that no "acceptable formal grievances" had been filed. However, the Office of Impact Aid acknowledged that grievances which did not comply fully with the formal process were not considered.

Today, many tribes have had their "federally recognized" status reinstated through Congressional legislation, see for example, 25 U.S.C. § 566 (Klamath), § 713 (Grand Ronde), § 731 (Alabama-Coushatta), and § 1300g (Ysleta del Sur). The termination era ended for all practical purposes in the 1960s (Tyler, 1973, pp. 172-183, 197-201) and was formally put to rest by Congressional action as part of the 1988 Indian Education Amendments (P.L. 100-297; Cong. Rec, 1988, p. S17392).

Post-Termination Policies

One of the most significant pieces of legislation to pass during the 1960s was the Economic Opportunity Act of 1965. For the first time in many years, Indians were given the opportunity to plan, develop, and implement their own programs outside of the framework of the BIA and the states. Out of these programs grew such projects as Head Start for the pre-school children, Upward Bound and Job Corps for teenagers, and the opportunity to train tribal people for management and administrative positions. Although the concept of community control of education had been suggested intermittently for over a century, the mechanism and the funds to develop such programs were finally provided in this Act. Increased community participation in the programs gave Native people a reason for learning, and this fostered the development of community-controlled schools.

Presidents Kennedy and Johnson were in favor of bringing educational and other support to the Native community programs under this Act. Neither of them recognized, however, that without a significant reorganization of the bureaucracy which had succeeded in paralyzing Native achievements for over a century, could the educational goals that many of the tribes had set for themselves be accomplished. The monies received from OEO were enough to begin the development of worthwhile projects, but funds from other sources, such as BIA or the Department of Health, Education and Welfare (HEW), were needed to expand and continue initial efforts.

Also in 1965, Congress passed the Elementary and Secondary Education Act (ESEA), which provided supplementary funds for innovative educational programs for disadvantaged youngsters including Natives. Some of the monies under Title I went to school systems where Native children were enrolled, other went directly to the BIA for use in the federal school system. Despite the tremendous potential of the program, the inefficiency of the BIA delivery systems and lack of monitoring on the parts of both the BIA and U.S. Office of Education, led to a misuse of monies, which is detailed in the NAACP Legal Defense Fund's publication, *An Even Chance*.

In 1974, Congress amended Title I to require local school districts to establish a Parent Advisory Committee (PAC) for each school receiving funding, 20 U.S.C. § 2734(j). The purpose of the PAC was to assist with planning, implementation, and evaluation of the Title I program in each school. While the advisory role of the PACs does not allow them veto power over programs established by the

school, they do provide the vehicle to formulate priorities for those programs which serve Native children.

Despite the inadequacy of the legislation, the lack of a clear-cut national policy, and the inefficiency of the BIA organization, the late 1960s did see educational programs flourish. The Demonstration School at Rough Rock, Arizona, was begun in 1966 by a group of concerned teachers, administrators, and parents. The Native community chose to run their school and elect an all-Native school board. Program development involved the adults in the community in designing the curriculum. Instruction was in both Navajo and English. The tribe supported the efforts of this community and eventually, so did the BIA.

In October of 1969, the BIA rejected the idea that Native administrators were needed and would not fund proposed graduate programs to develop Native leadership in education. The official in charge of professional training maintained that all adminsitrative positions were filled already, albeit mainly with non-Natives, and no new ones were needed. But, the OEO Indian office director was interested in helping to develop Native leadership. With funding from OEO, graduate fellowship programs were developed at four universities: The Pennsylvania State University (Penn State), Harvard University, Arizona State University, and The University of Minnesota. These programs were strongly opposed by some of the BIA area office officials, especially the BIA area offices in Juneau, Alaska, and Window Rock on the Navajo Reservation. Other BIA offices, including the Anadarko Area Office in Oklahoma, cooperated by nominating Native BIA employees to attend the leadership programs. Seventeen Native graudate students, all BIA employees in about GS 5 level positions, were enrolled in the first wave in the Penn State program. The programs graduated well educated Natives with doctorates who were prepared to compete successfully against non-Native professionals for top positions in Native education programs operated by federal, state, and tribal agencies. The graudates of these four original graduate programs and Native graduate programs in other institutions that developed in the early 1970s provided the Native leadership needed to cause a change in the status quo of the Native education policy and implement Native control of Native education (Lynch & Charleston, 1990, pp. 7-8).

The confirmation of greater authority in a variety of areas, including Native education, were the goals of Native governments. These goals were being confirmed by federal legislation during the 1970s and 1980s which was directed at the elementary, secondary, and vocational schools and community colleges serving Native communities.

Self-Determination Era

In 1969, a comprehensive report by the special Senate Subcommittee on Indian Education, popularly known as the "Kennedy Report," proclaimed the state of Native education to be a "national tragedy" (U.S. Senate, Special Subcommittee on Indian Education, *Indian Education: A National Tragedy — A National Challenge*, S. Report No. 91-501, Committee on Labor and Public Welfare). The self-determination era was ushered in with the 1970 Message of the President of the United States Transmitting Recommendations for Indian Policy.

In that statement Richard Nixon called for:

1. Self-determination.
2. Repeal of HCR 108 setting termination as policy.
3. Tribal control and operation of federal programs.
4. Restoration of sacred lands of Taos Pueblo at Blue Lake.
5. Economic Development through Indian Financing Act.
6. Increase in financial support for Indian Health Service.
7. Assistance for Urban Indians.
8. Establishment of Indian Trust Counsel Authority.
9. Establishment of an Assistant Secretary for Indian Affairs.

Congress responded with the Indian Education Act in 1972 before it responded with the broader Indian Self-Determination and Education Assistance Act of 1975. The promotion and passage of this legislation fueled the arguments that were taking place regarding the role of federal, state, and Native governments with respect to education issues. It took 18 years before Congress was willing to formally end the infamous termination policy by repudiating HCR 108 with the passage of Public Law 100-297 of April 28, 1988 (25 USC 2001, Title V, Part B, § 5203 (f)).

The authority of tribal government was defined further in the 1970s and 1980s. These decades have not necessarily clarified the authority of Native governments, because Congress and the Supreme Court seem to be proceeding along divergent paths with respect to their views about the power and authority of tribal governments. How-

ever, the two branches of the governments both seem to be supportive of Native education.

The political authority of tribes to provide effectively for the economic and social well-being of their tribal members has been enhanced by various legislative acts since the Nixon Indian Policy Statement. Moreover, Congress acknowledged that the assimilation/termination policy was a failure and rejected the termination policy by passing the Menominee Restoration Act in 1973.

The Indian Education Act

An important piece of legislation for Indian education was signed into law in 1972. It was entitled the Indian Education Act of 1972 (Public Law 92-318) and provided monies for supplementary innovative programs for Native students. The chief administering office was the U.S. Office of Education. The monies from the Act provided to public schools cannot be used for operational expenses, except in the case of Native-controlled schools. The Act provides for local parent committees to be involved in all aspects of the administration of special Native education grant projects to public schools. In other words, the Act made possible funding of the programs that Native tribal and community members want for their children and which could never find an authorization under any other legislation. The Act was developed to address the special educational needs of Native children. To be eligible for funding, a school district must show that projects were developed with the participation and approval of a parent advisory committee composed of parents of the Native children whom the program is to serve. Congress has established a legislative framework which requires Native participation for programs that operate outside Indian Country which are designed to serve the education needs of Native children. The Act is designed to overcome past attitudes of hostility that permeate the relationships of Native governments with the surrounding state governments (U.S. Senate, 1969, pp. 52-54).

The initial appropriation under this Act was $18 million. It also established a Bureau of Indian Education within the Office of Education and a National Indian Education Advisory Council. It is important to note that the program under the Indian Education Act would not have been implemented without the untiring efforts of Native people throughout the country because this was one of the programs which was caught in the impoundment squeeze of 1973. Rescued by lawsuits litigated by Native attorneys, the Indian Education Act had the potential of building strong Native community-controlled educational programs on State and federal reservations, in rural communities and in cities across the country.

Indian Self-Determination and Education Assistance Act

The Congress took a major step to support Native governments in the mid-1970s. On January 4, 1975, the Indian Self-Determination and Education Assistance Act was enacted (Public Law 93-638). The Act provides that:

"a. The Congress, after careful review of the federal government's historical and special legal relationships with, and resulting responsibilities to, American Indian people, finds that:
   1. The prolonged federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
   2. The Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons."

In addition to reiterating the federal government's recognition of tribal sovereignty, the Indian Self-Determination Act was intended to strengthen tribal governments by directing the Bureau of Indian Affairs and the Indian Health Service to contract out to Native governments most of the services administered by these agencies. The Act also authorized grants to help strengthen tribal management of Native community services. Of singular importance is the Act's explicit disclaimer that the law is in no way a termination of the federal government's trust responsibility to Native governments.

Indian Preference in Employment

Another concept which finds support in treaties is the concept of Indian preference in employment. Although it can be argued that the Delaware Treaty of 1778 manifested a preference in employing the "best and most expert warriors" in the Revolution, the first clear expression of Indian preference in employment is the Act of March 5, 1792, where the United States provides for the

employment of Indians in the defense of its frontiers. Indian preference in employment then appears in mid-century treaties such as the Chippewa Treaty of 1863. Indian preference could have been used to employ Natives in Bureau of Indian Affairs operated educational institutions.

Indian preference is applicable to federal Native education programs. It is applied in the Bureau of Indian Affairs and the Indian Health Service. In the Education Ammendments Act of 1988 (Public Law 100-297), Indian preference was extended to the Office of Indian Education in the U.S. Department of Education, but not to any of the other Department of Education programs targeting Native students. Implementation of Indian preference, in the Office of Indian Education in the Department of Education has been very slow and with considerable opposition from the union and the bureaucracy of the Department of Education. Unfortunately, the federal Indian employment preference statutes have had a very limited impact (*Morton v. Mancari*, 417 U.S. 535 [1974]).

American Indian Policy Review Commission

The American Indian Policy Review Commission was established by Congress in 1975 to conduct a comprehensive review of the historical and legal developments underlying the Indians' relationship with the federal government, and to determine the nature and scope of necessary revisions in the foundation of policy and programs for the benefit of American Indians (Public Law 93-580, 25 U.S.C. § 174).

In its Final Report, the Commission advocated continued respect for the inherent sovereignty of Indian tribes and set forth these principles to guide the United States government:

The fundamental concepts which must guide future policy determinations are:

"a. That Indian tribes are sovereign political bodies having the power to determine their own membership and power to enact laws and enforce them within the boundaries of their reservations, and

b. That the relationship which exists between the tribes and the United States is premised on a special trust that must govern the conduct of the stronger toward the weaker."

The concept of sovereignty and the concept of trust are imperative to the continuation of the federal-Indian relationship. These form the foundation upon which the United States entire legal relationship with the Indian tribes stands. These are not new precepts — they are old, dating from the origins of this Nation.

Indian Child Welfare Act of 1978

The Congress continued further recognition and promotion of tribal sovereignty in the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. This law was enacted in response to the increasing number of Native children being adopted or placed into non-Native families. The Act restricts non-Native social agencies from placing Native children in non-Native homes, absent tribal or parental consent. It acknowledges the jurisdiction of tribal courts over child custody in related cases on the reservation and requires that full faith and credit be accorded tribal court orders in these matters. It also provides for the transfer of jurisdiction from state to tribal courts under certain conditions, such as parental or tribal request to recover off-reservation Native children. By the provisions of this Act, tribal law can reach beyond the reservation and can affect court proceedings anywhere in the United States.

Title XI of the Education Ammendments Act of 1978

Public Law 95-561, Title XI of the Education Ammendments Act of 1978, promoted Native self-determination by stating "...it shall be the policy of the Bureau [of Indian Affairs], in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education." The Act directed the Bureau to fund Native schools according to an "Indian school equalization formula" designed to achieve an equitable distribution of funds among the schools. The result was the ISEP formula (Indian School Equalization Program formula) that is a weighted per capita distribution of funds. The Act mandated a set of uniform education standards to be established for all BIA and contract schools. Teachers and other education personnel were placed on direct contract basis with each school to remove BIA education personnel from the federal civil service system. The Act provided for local control of Native education through local school boards with expanded roles and authority and created local BIA agency superintendents for education reporting directly to the Office of Indian Education in the central office in Washington. This reorganization removed education from the direct authority of the local BIA agency superintendents and the area offices.

The BIA responded to Public Law 95-561 with task force studies and the creation of the mandated positions and documents. However, the intent of

the Act to promote Native self-determination in education has not been implemented. Federally funded Native education remains firmly controlled by the BIA. The bureaucratic administration of the ISEP formula funding has created uncertainity, instability, and a general lack of adequate funding for federal Indian schools. Some tribes have responded to the inadequate funding and lack of local control by abandoning the federal system and developing community-controlled public schools, such as on the Rocky Boys Reservation in Montana and Zuni Reservation in New Mexico.

The Indian Tax Status Act of 1982

This law, originally passed in 1982, and amended in 1984 and 1987 was intended to place tribal governments on the same footing as state government with respect to treatment under federal tax provisions. The Committee report stated:

> Many Indian tribal governments exercise sovereign powers; often this fact has been recognized by the United States by treaty. With the power to tax, the power of eminent domain, and police powers, many Indian tribal governments have responsibilities and needs quite similar to those of State and local governments.
>
> Increasingly, Indian tribal governments have sought funds with which they could assist their people by stimulating their tribal economics and by providing governmental services.
>
> The committee has concluded that, in order to facilitate these efforts of the Indian tribal governments that exercise such sovereign powers, it is appropriate to provide these governments with a status under the Internal Revenue Code similar to what is now provided for the governments of the states of the United States. The committee understands this would be of greatest significance at this time in the area of gifts or contributions to Indian tribal governments, exemptions with respect to excise taxes, the deductibility of income taxes paid to these governments, and the ability of these governments to issue tax-exempt bonds. A number of other points have been presented as to which the committee also agrees that Indian tribal governments should be treated essentially the same as State governments. (S. Rep. No. 97-646, 97th Cong., 2d Sess. p. 2)

Pacific Salmon Treaty Act of 1985

Treaties are an issue of prime concern to American Indian tribal governments. United States treaties with American Indian tribes presently protect rights of many tribes. In 1985, the U.S. Congress passed the Pacific Salmon Treaty Act of 1985 (United States-Canada), Public Law 99-5, Act of March 15, 1985, 99 Stat. 7, which provided that one of the four United States treaty commissioners should be nominated by the treaty Indian tribes of the states of Idaho, Oregon, and Washington. Similar nominations were to be made by the tribes for two of six commissioners serving on the Southern Panel and one of four commissioners on the Fraser River Panel. The tribes involved were signatories to treaties with the United States in or about 1855. The object of the law was to implement the January 28, 1985, treaty with Canada and protect the tribal treaty fishing interests secured a century earlier. Time and circumstances required new legislation and the Congress took appropriate action.

Indian Self-Determination Act Amendments of 1988

The Indian Self-Determination and Education Assistance Act of 1975 had shown itself in need of revision. In the fall of 1988, the U.S. Congress passed laws to bring this act up to date. The new law is entitled the "Indian Self-Determination and Education Assistance Act of 1988." The law adds this new language:

> (b) The Congress declares its commitment to the maintenance of the federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes and the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities. (Public Law 100-472, Act of October 5, 1988, 102 Stat. 2285)

The amendments to the law went on to provide under Title III, for the support of demonstration tribal self-governance projects.

Indian Fishing Rights and Taxation

The U.S. Congress also passed legislation to confirm Native fishing rights. Public Law 100-647

provided for Native Fishing Rights in subtitle E, 102 Stat. 3640, and stated that there would be no federal or state income tax on the exercise of treaty related fishing rights. The tribes have contended for years that because their treaties were silent on the matter that they had not given any authority to tax to the United States. The U.S. Internal Revenue Service took the opposite view that the treaties had not granted any exemption and therefore the income was subject to taxation. Congress took legislative action to side with the treaty tribes.

Tribally Controlled Schools Act of 1988

The Tribally Controlled Schools Act of 1988 reemphasizes tribal control by stating the following:

> ...The Indian Self-Determination and Education Assistance Act, which was a product of the legitimate aspirations and a recognition of the inherent authority of Indian nations, was and is a crucial positive step towards tribal and community control ...

Congress took the opportunity to make a declaration of policy in this law in which it "declares its commitment to the maintenance of the federal government's unique and continuing trust relationship with and responsibility to the Indian people...."

Congress defined a national goal towards Native people in these words:

> The Congress declares that a major national goal of the United States is to provide the resources, processes, and structures which will enable tribes and local communities to effect the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

The Act specified that "Congress affirms the reality of the special and unique educational needs of Indian peoples, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities."

The Act also reaffirmed federal relations by stating that "Congress declares its commitment to these policies and its support, to the full extent of its responsibility, for federal relations with the Indian Nations."

Death Penalty Act

During debate of the proposed federal Death Penalty Act in June of 1990, Senator Inouye, Chairman of the Senate Select Committee on Indian Affairs, offered an amendment to allow Indian governments to determine whether or not the death penalty should apply on their reservations. Before the Senate voted to keep the amendment in the bill, Senator Inouye reminded the Senate of the status of Indian tribes:

> I believe that all of us should recall that Indian tribes are sovereign. They [have] been sovereign from the days of our Founding Fathers. As proof of that, there are 370 treaties in effect at this moment, treaties that have been ratified by the U.S. Senate. As sovereign people ... they should be given the right to determine whether their people should be subjected to the death penalty .... This is nondiscriminatory, fair legislation, recognizing the sovereignty of Indian people. It is that simple. (June 28, 1990, 136 Cong. Rec. 9045)

Contemporary Responsibilities and Relationships in the Education of American Indians and Alaska Natives

The United States Congress has established a legislative framework to address the needs of Native students that is spread across several executive branch departments and agencies of the federal government. The most prominent federal agency involved in Native education is the Bureau of Indian Affairs whose traditional role has been to address the nation's "Indian problem" including those in education. The second agency is the U.S. Department of Education whose purpose is to serve the educational needs of all the nation's children including those who are Native.

The roles of the tribes in education has been the subject of much legislation and debate over the past two hundred years. Except for a brief period in the mid 1970s and early 1980s, the tribal role has been very small during the twentieth century. With the present renewed federal trend of shifting responsibility for educating Native students from the federally-funded BIA and tribal schools to the public schools, the role of the states is increasing while the role of tribes is decreasing.

Federal Role

Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) of the Department of the Interior serves the educational needs of Natives through an array of programs. The most obvious mechanism is through the 182 schools that BIA operated in 1990. The Bureau of Indian Affairs contracts with tribes and ad-

ministers grants to tribes for the operation of schools. In 1990, a total of 76 schools were operated by tribes.

The Bureau of Indian Affairs administers the Johnson O'Malley program which is directed at funding special education needs of Natives in public schools.

The Bureau of Indian Affairs also operates Postsecondary Education Programs established for Natives. One program provides special higher education scholarships and another program provides Adult/Vocational Education Programs.

Department of Education

The U.S. Department of Education has an Office of Indian Education which has the responsibility for Native Education. The statutory authority is provided through the Indian Education Act which funds 1,100 public schools. It also has an Indian Fellowship Program to address needs for financial support in postsecondary studies.

The Department of Education also serves Natives through the Compensatory Education Program under Chapter I and Migrant Programs. The Impact Aid Program, Bilingual Education, and the Drug Free Schools and Communities Act are also administered by the Department of Education.

Department of Health and Human Services

The Department of Health and Human Services also has programs serving the educational needs of Natives. These consist of the Head Start Program and the Indian Health Professions Scholarships Program.

Department of Labor

The Department of Labor operates programs for vocational, technical, and employment training for Native youth and adults. These programs include Job Corps, Job Training Partnership Act (JTPA) programs of Public Law 97-300, and Job Opportunities and Skills Program (JOBS) of Public Law 100-485. The programs provide funding for Native communitites and organizations to serve the employment training needs of Natives students.

Tribal Role

Native Controlled Schools

Federal agencies are not the only parties concerned with the education of Native children. Native parents have concerns about the adequacy of education for their children in terms of content and value and have demonstrated their motivation by providing access to education by establishing schools in urban environments, rural areas, and reservation areas. The tribal role in education has been limited by inadequate funding of tribal schools and continuing conflicts with federal agencies over local control and decision-making authority. In 1990, tribes operated 58 elementary and secondary day schools, 12 boarding schools, and 6 peripheral dormitories providing residential services to Native children attending public schools.

There has been increasing criticism of the operation of tribal governments over the last few years. The U.S. Civil Rights Commission is expected to issue a report critical of tribal courts (134 Congressional Record, Nov. 10, 1988, S-17391, 17393). The Senate Select Committee on Indian Affairs issued a report critical of tribal government operations in 1989 (A New Federalism, 1989, p. 13). The recent conviction of Navajo Tribal Chairman Peter MacDonald on corruption charges in 1990 have cast tribal government in the same light as the Oklahoma County Commissioners scandal cast a shadow on local county government.

Tribes are cognizant of the problems and are moving to improve their government operations by revising their constitutions, instituting improved courts systems, and overhauling their administrative operations. The purpose of a revitalized and strengthened government is to serve the needs of Native communities. High on their list of priorities is the improvement of the education available to Native students and an increase in the financial resources needed to provide that education.

Tribally Controlled Community Colleges

Reservations are generally remote from urban areas and community colleges. This translates into limited access to postsecondary education for Natives. As a consequence, tribes formed the American Indian Higher Education Consortium in 1972 to overcome this lack of access to higher education. Recognizing that accreditation and financing were linked, the Consortium moved to shortcut some of the problems. The Consortium successfully achieved the financing goals by lobbying through Congress the Tribally Controlled Community Colleges Act of 1978 and secured reauthorization. The Native governments now operate 24 community colleges; two are four-year institutions. Nurtured in a Native social and cultural environment, the college students who attend these institutions now have a foundation for success in Indian Country.

Native Community Control

Although Native community control offers the hope for the future of Native education today, it is not by any means a new concept. In the early 1800s the Cherokees, Creeks, and Choctaws had established educational systems. Under the leadership of Sequoyah, the Cherokees developed their own syllabary, curricular materials, and even published a bilingual newspaper. Among the three tribes there were over 200 schools and academies. The success of the system was so great that 90 percent of the tribal people were literate (U.S. Senate, 1969, p. 19), a percentage extraordinary for the U.S. population then and today. When the federal government stepped in and took over the schools at the turn of the century, the progress made under community control began to reverse itself.

With programs geared to Native community-control, such as those funded by the Economic Opportunity Act, came a renewed interest in community control. Approximately a half dozen Native communities facing severe educational problems decided that the time for community-control had come. But the process did not happen over night. Assistance from foundations and government agencies and lawyers was needed to successfully fight all the battles that confronted the Native communities.

Native Community-control of education is directly in line with President Nixon's 1970 address on Indian Affairs, where he said that Indian tribes and communities should have self-determination especially in the area of education. The government, however, has not facilitated the transfer to Native community-control. Instead, it has turned up stumbling blocks wherever possible. The BIA is not committed to self-determination and fights hard to keep from entering into contracts with local Native communities. As a result, the Native communities have solicited the services of lawyers or technical assistance resource groups to help negotiate the problems.

Organizations have been formed by concerned Native people for the very purpose of assisting Native parents and Native communities improve the educational opportunities for their children. They also help Native community members negotiate the necessary political arenas which refuse to turn the local schools over to the community. Examples of such organizations are the National Indian Education Association and the Coalition of Indian Controlled School Boards. The Coalition serves some 90 communities, parent groups, and school districts who either have already achieved control of their school or who are in the process of negotiating with local, state and federal officials for such a takeover.

State Role

State efforts to address the educational needs of Native students are largely confined to providing Native students access to standard curricula in off-reservation public schools largely through federal financing incentives attached to Indian education programs. Minnesota has made substantial efforts in this area (Beaulieu, Commissioned Paper 20 of the Supplemental Volume, 1991). The public schools are supported with funding through the Johnson O'Malley program of the BIA and the Indian Education Act programs and Impact Aid programs of the Department of Education. All of these programs compensate public schools for assuming the responsibility for educating Native students. Impact Aid funds for public schools have increased steadily as the BIA budgets have declined in the 1970s and 1980s. The result of the shift in funds to public education has been a parallel shift in Native student enrollment from the poorly funded federal and tribal schools to the more financially stable and secure public schools.

Native community and tribal involvement in public education is very limited. The Native parent advisory committees required by some of the federal programs in the Department of Education have very limited impact on pubic school decision-making and administrative practices. In many cases, the requirements are ignored by both the public schools and the federal agencies as being impractical to implement. Where they exist, the parent advisory committees are acceptable to the state and federal agencies as surrogates for the role of tribes and Native governments. Their purpose is to legitimize that the programs operated under state control meet the needs of Native students.

There are a few exceptions to the non-Native control of public schools. A few on-reservation public schools operated under the control of Native school boards, such as the Rocky Boys Elementary School on the Rocky Boys Reservation in Montana and the Zuni Public School District on the Zuni Reservation in New Mexico. These Native communities schools elected to shift from federal control for state control to obtain greater and more stable funding for the schools.

Recent Supreme Court Decisions

Confirmation of the governmental powers of Indian tribes is found in the decisions of the

Supreme Court on several cases argued before the Court in recent years.

Tribal Jurisdiction in Criminal Cases

Oliphant v. Suquamish Indian Tribe

Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1079 (1978), a 1978 decision of major importance, restrains the exercise of tribal sovereignty in the area of criminal jurisdiction. In this case, the Supreme Court held that Indian tribes have no inherent power to try and punish non-Indians who commit crimes on Indian reservations unless the tribe has been granted such power in a treaty of agreement or by act of Congress. The case involved two non-Indians who had violated tribal laws on the Port Madison Reservation and who had been convicted and sentenced by the tribal court. Although stating that "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the federal government," the Court maintained that "by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."

The Supreme Court could find no law which specifically removed the tribal power to assert criminal jurisdiction over non-Indians, yet it ruled that the exercise of this power is "inconsistent with the status" of Indian tribes. The Court found that the tribe's criminal jurisdiction over non-Indians had implicitly been curtailed by the entire history of Indian-United States relations. For the first time, the Supreme Court declared that a fundamental tribal power could be extinguished by implication. Limiting tribal power on this basis directly contradicts the long-standing principle of Indian law that Indian tribes retain all inherent sovereign powers unless specifically restrained by Congress or given up in a treaty or agreement.

United States v. Wheeler

The Supreme Court's statement in *Worcester v. Georgia*, that Native governments are "distinct, independent political communities" is still relied on today in support of the inherent sovereignty of Native governments. One of the recent cases to rely on concepts developed by Chief Justice Marshall in *Worcester*, and consistently relied upon by the courts in their decisions since 1832, is the 1978 decision of the Supreme Court in a case known as *United States v. Wheeler*, 435 U.S. 313 (1978), wherein the sovereign nature of tribes was once again reaffirmed. This case held that because Indian tribal courts and federal courts derive their authority from separate sovereigns, the double jeopardy clause of the United States Constitution does not prohibit prosecution in federal court of an Indian defendant already tried and sentenced for the same acts in tribal court. A member of the Navajo Tribe had been convicted of a crime by the Navajo Tribal Court. Federal authorities, believing that the Navajo had not been punished sufficiently, prosecuted him for the same actions in federal court. The Navajo appealed, claiming that the double jeopardy clause, which prohibits a defendant from being prosecuted twice by the same sovereign for offenses arising out of the same acts, made the federal prosecution illegal. The defendant argued that since he had already been tried in a tribal court which was actually "an arm of the federal government," forcing him to stand trial in a federal court for the same acts would in essence be a second prosecution brought by the same sovereign power.

The Supreme Court held that the Indian defendant could be prosecuted again by the United States, since Indian tribes remain separate political communities with inherent powers to enact laws and to prosecute tribal members for violations of those laws. Because prosecution was brought by two different sovereigns, the federal government and the tribal government, the double jeopardy clause did not apply in this case. The Supreme Court stated:

> It is evident that the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and the tribal exercise of that power today is therefore the continued exercise to retained tribal sovereignty.

The Court emphasized the fact that the authority of tribes to prosecute criminal acts arises from the inherent power of a sovereign, rather than from any federal delegation of power.

Duro v. Reina

On May 29, 1990, in *Duro v. Reina* (1990) the Supreme Court held that the Salt River Pima-Maricopa Tribe did not have criminal misdemeanor jurisdiction over a non-member Indian working and residing on the reservation. The tribe prosecuted Duro on a misdemeanor charge of discharging a firearm when the federal district attorney dropped charges against Duro for the murder of a 14 year old Indian boy. The Supreme Court reasoned that the legislative, executive, and judicial branches of the federal government had always

presumed the tribes lacked criminal jurisdiction over non-member Indians.

On October 24, 1990, Congress took action on what it regarded as an "emergency situation" created by the Supreme Court in *Duro*. Congress saw the decision as "Reversing two hundred years of the exercise by tribes of criminal misdemeanor jurisdiction over all Indians residing on their reservations." "Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members." Congress then proceeded to amend the Defense Appropriation Act to suspend the effect of *Duro* until after September 1, 1991, while Congress considers comprehensive legislation to deal with the problem created by the *Duro* decision (136 Congressional Record, October 24, 1990, H13596).

To tribes the decisions limiting their authority and allowing state jurisdiction within Indian Country indicate that the Supreme Court has embarked on the same policy of termination that Congress embraced during the 1950s.

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* __U.S. __ (1989) and *Duro* decisions the Supreme Court indicated that if the Congress disagreed with their decisions, Congress could take action. After *Duro*, Congress did so with what can be regarded in comparison with budget issues as lightening speed. Tribal governments may have found common ground with Congress. The Congress may feel that its power to regulate commerce with the Indian tribes is being infringed upon by Court decisions which go contrary to its legislation promoting economic development and tribal government. Congress is taking an active role through measures like the proposed, "New Federalism for American Indians Act," S.2512, 101st Cong., 2d Sess. (April 25, 1990). Because Indian affairs is not a major policy area like defense or the budget or health or education, Congress may feel that it can take substantial action and gain a positive image by acting favorably towards America's oldest governments and smallest minority.

Most certainly, the tribes will act to convince Congress to take decisive action to stop the Supreme Courts incursions. They will most certainly look to alternative opportunities and forums to vindicate their rights if Congress and the tribes cannot reach agreements. From the tribal point of view, the Supreme Court tried to do to the Native governments what Iraq is tried to do with Kuwait. A major concern of the Native governments is that the jurisdictional erosion will spill over into other areas such as education. The goal of the Native governments, of course, will be the application of the original principles espoused by Vitoria for treatment of the Native governments.

Treaty Rights and Tribal Sovereignty

United States v. Washington

On July 2, 1979, the Supreme Court issued an important decision on three consolidated cases on review of district court orders implementing the famous Judge Boldt decisions in *United States v. Washington*. The three cases consolidated were: *Washington v. Washington State Fishing Vessel Assn., State of Washington v. United States, Puget Sound Gillnetters Assn. v. United States District Court*, 99 S. Ct. 3055 (1979). In a 6-3 decision, the Court upheld the decisions of the lower federal courts.

At issue in the case was the interpretation of various treaties signed in 1854 and 1855 between the United states and a number of Native governments living in the coastal regions of Washington State. In these treaties, the tribes relinquished their interests in a vast amount of land in exchange for monetary compensation, relatively small parcels of land, and other guarantees such as protection of their "right of taking fish at usual and accustomed grounds ... in common with all citizens of the territory."

The major issue was the interpretation of this phrase. The Supreme Court held that the term "in common with" meant the Indians had a right to take a certain amount of the harvestable fish, 45 to 50 percent, rather than merely an opportunity to try to catch some fish.

The Court reasoned that the treaties were signed between sovereign nations which reserved to themselves an approximately equal percentage of a harvestable natural resource. Thus, the Court stated:

> ... a treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. When the signatory nations have not been at war, and neither is vanquished, it is reasonable to assume that they negotiated as equals at arms length. There is no reason to doubt that this assumption applies to the treaty at issue here. Accordingly, it is the intention of parties, and not solely that of the

> superior side that must control any attempt to interpret the treaties.

Pointing out that the treaties should be interpreted according to what the Indians thought they meant, the Court also stated:

> It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter 'should be excluded from their ancient fisheries,' and it's accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish. That each individual Indian would share an 'equal opportunity' with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations. Such a 'right,' along with the $207,500 paid the Indians, would hardly have been sufficient to compensate them for the millions of acres they ceded to the territory.
>
> Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive 'reservation' of that right at merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.

In reaching this decision, the Court affirmed that the Indians had granted certain rights or property interests to the United States in these treaty transactions and that those matters not mentioned in the grant were reserved or retained by the Indian grantors. Further, this decision reaffirmed the sovereign status of Indian tribes in contracting parties in treaty negotiations.

Indians Reservations in Oklahoma

In 1978, the *Littlechief* (1978) case and the *Chilocco* (1978) case confirmed that Indian Country still existed on tribal and allotted lands in western Oklahoma. Despite the popular saying that there are no reservations in Oklahoma, except the Osage Reservation, no one can show the legal basis for this assertion. In fact, federal cases have reached a contrary conclusion. With the courts renewed recognition of Indian Country in Oklahoma in 1978, tribes in western Oklahoma moved to establish courts and law enforcement systems. A 1980 case, *Cheyenne-Arapaho Tribes v. Oklahoma* (1980), held that land of that tribe is an Indian reservation. Tribes in eastern Oklahoma are currently engaged in the same effort since the decisions in *Creek Nation v. Hodel* ( ).

The recognition of Oklahoma as Indian Country may help lay a foundation for the argument that a tribal community college or colleges should be established in Oklahoma. The existing colleges and universities will react with opposition because they would perceive such a move as threatening their income from Native students. At the same time, the tribes would probably have to achieve some satisfactory political arrangement to govern one or more such tribal community colleges.

In 1991, the outgoing and the incoming governors of Oklahoma have expressed their belief that the tribes and the state have mutual economic interest and that they can and should work together. These agreements are to be approved by the Joint Committee on State-Tribal Relations of the Oklahoma legislature and the U.S. Secretary of the Interior. There may be an opportunity to convince the legislators that the creation of tribal community colleges would be an economic opportunity for Oklahoma which should be pursued.

Taxation and Zoning

Merrion v. Jicarilla Apache Tribe

In a case known as *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) the U.S. Supreme Court in 1982 rejected a legal challenge against a severance tax imposed by the Jicarilla Apache Tribe on oil and gas producers on its reservation. Justice Thurgood Marshall, writing for the majority, construed the sovereignty of Indian tribes to include the power to tax business and commercial activities of outsiders on tribal lands. The tribal power to impose the severance tax was upheld as an incident of the inherent sovereignty of the tribe. The Court concluded that, "the tribes' authority to tax non-Indians who conduct business on the reservation does not simply derive from the tribes' power to exclude such persons, but is an inherent power necessary to tribal self-government and management."

The Court acknowledged that the taxing power was subject to congressional regulation, and in this case subject to approval by the Secretary of the Interior as well. These factors, said the Court, "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of tribal power to tax will be consistent with national policies."

Ramah Navajo School Board, Inc. v. Bureau of Revenue

The role of the state in Native education in Indian Country was summarized in the *Ramah Navajo School Board, Inc. v. Bureau of Revenue*,

458 U.S. 832 (1982) case in which the Supreme Court refused to let New Mexico impose a tax:

> In this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying the tax. Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education — a scheme which has "left the State with no duties or responsibilities."

Generally the federal government and Native governments continue to have the primary responsibility for educating Indian children within Indian Country.

Kerr-McGee v. Navajo Tribe

While Jicarilla provided a positive result in a challenge to tribal authority the Kerr-McGee case raised a new question. Would "secretarial approval" be essential to the validity of a tribal tax? Tribal taxing authority was consistent with the national policies of self-determination and self-sufficiency. There was great fear that tribal taxing power would flounder on the rock of "secretarial approval." This potential obstacle was laid to rest in *Kerr-McGee v. Navajo Tribe*, 471 U.S. 195 (1985). The Supreme Court approved tribal leasehold property and gross receipts taxes on mineral extraction activities despite the absence of secretarial approval for the Navajo as a non-Indian Reorganization Act (IRA) tribe. Taxes have been historically recognized as flowing from tribal sovereignty, but "secretarial approval" provisions which appeared in virtually all IRA constitutions. The "secretarial approval" provisions were found inapplicable to non-IRA tribes like the Navajo. If IRA tribes want to remove the "secretarial approval" provisions in their constitutions, the Court found that "such tribes are free, with the backing of the Interior Department, to amend their constitutions to remove the requirement of secretarial approval."

The general premise sustaining tribal taxes was provided by Merrion:

> The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. They benefit from the provision of police protection and other governmental services, as well as from "the advantages of a civilized society" that are assured by tribal government. Numerous other governmental entities levy a general revenue tax similar to that imposed ... [for] comparable service.

This premise, applicable equally in Indian and non-Indian contexts, has controlled the Court's tribal taxation approach in recent years. Provided that some tribal government services are enjoyed by the entity subjected to the tax, both Merrion and Kerr-McGee reflect the Court's continued willingness to sustain taxes on nonmembers, despite the absence of such taxes for a long period of time, and, where appropriate, despite the absence of secretarial approval.

Washington v. Confederated Tribes of the Colville Reservation

Tribal taxing authority was also upheld in the case of *Washington v. Confederated Tribes of the Colville Reservation*. There the court examined the authority of the state of Washington to impose a state cigarette tax and other taxes at the same time that there were tribal taxes on the same products. The state of Washington had argued that the tribes had no power to impose their cigarette taxes on non-tribal purchasers. The court rejected the argument and held that the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. What is clear from *Jicarilla*, *Kerr-McGee*, and *Colville* is that tribes, like states, can use taxes to raise revenues to help pay for schools, roads, tribal government and other governmental services.

Cotton Petroleum Corp. v. New Mexico

On April 25, 1989, in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S., 109 S.Ct. 1698 (1989), the Supreme Court held that the state of New Mexico could validly impose severance taxes on a company doing business within the reservation even though the tribe also imposed such a tax. It poses a problem for the development of tribal economies and industry and seems contrary to the direction Congress has set through legislation.

The court noted that "significant" services were provided by the state. The decision sets the tribal government and the state government in conflict about raising revenues to fund tribal services like education.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation

On June 29, 1989, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* the Supreme Court allowed a county of the state of

Washington the authority to zone within that part of a reservation in which there was a substantial non-Native population. It raises the possibility for tribal-state conflict over school issues at some future date, although in all probability the federal preemption of Native education will exclude state authority.

Tribal Courts

National Farmers & LaPlante

Two recent Supreme Court cases involve the jurisdiction of tribal courts, *National Farmers Union Life Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 107 S. Ct. 971 (1987). In *National Farmers*, the Court reviewed the assertion of tribal court jurisdiction over a state-owned, on-reservation school and its non-Indian insurer, regarding a personal injury to a tribal member student which occurred at the school. The plaintiff prevailed because of a default judgment against the school district in tribal court. The schools insurance company, National Farmers, sought federal relief, involving general federal question of jurisdiction pursuant to 28 U.S.C. § 1331.

The Court said these elements will have to be examined to determine the extent of tribal civil jurisdiction: the extent to which tribal sovereignty has been altered, diverted, or diminished, and a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. Finally the Court applied an "abstention" rationale, "concluding that examination of the case should be conducted in the first instance in the tribal court itself."

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide a forum whose jurisdiction is being challenged the first opportunity to evaluate the faculty and legal basis of the challenge. Moreover, the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning the appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the tribal court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers followed an "exhaustion of tribal remedies" approach. *LaPlante*, a case decided in early 1987, was even more supportive of tribal court authority. An Indian employee of a member-owned ranch on the Blackfeet Reservation sued the ranch in tribal court for personal injuries (sustained while at work) and sued the ranch's insurer for bad faith refusal to settle the claim. After the tribal court found that it had valid civil jurisdiction, the insurer unsuccessfully sought relief in federal court. The insurer had argued that the federal court had jurisdiction because plaintiff and defendant were citizens of different states. The Supreme Court held that the *National Farmers* "exhaustion" rationale applied in diversity as well as federal question cases. The Court emphasized that the federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. The Court then went beyond a simple "exhaustion" requirement, applying a principle analogous to comity or full faith and credit to substantive decisions of tribal courts as well.

> Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review. If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. Unless a federal court determines that the tribal court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad faith claim and resolved in the tribal courts (Arrow, 1987, pp. 487-492).

In both *National Farmers* and *LaPlante*, the Court reserved the issues concerning tribal civil jurisdiction for post-abstention adjudication. In *LaPlante*, however, the Court provided gratuitous dictum concerning how the ultimate jurisdictional issues are likely to be resolved:

> We have repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain

'attributes of sovereignty over both their members and their territory.

Tribal courts play a vital role in tribal self-government, and the federal government has constantly encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted ... .

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statutes.

LaPlante's sweeping conclusion of non-jurisdictional non-reviewability grants potentially enormous authority to tribal courts acting within their jurisdiction in civil cases. With this authority, of course, goes enormous responsibility as well. While tribal courts, in most cases, are of relatively recent vintage, and vary widely in terms of structure, authority, and resources, their effective and judicious use of the authority extended by *LaPlante* will be critical to ensure continued judicial deference and forestall Congressional intervention.

The Bill of Rights, of course, is inapplicable to tribal judicial proceedings, and the Indian Civil Rights Act is enforceable only by habeas corpus in criminal cases. Nevertheless, tribal authorities should be cognizant that skeptics concerning tribal autonomy undoubtedly remain, and that proposals for federal intervention — should tribal court remedies be perceived to be unjust — have ranged from a "converse application of *National Farmers* ... wherein the question would not be whether the tribal court had proper subject matter jurisdiction, but whether the tribal court had applied the [Indian Civil Rights Act] as mandated by *Santa Clara Pueblo v. Martinez* to guarantee a right with a remedy and a forum," to a national Indian Court of Appeals, to the outright abolition of tribal courts.

Models for Conflict Resolution

In formulating programs directed at serving the educational needs of Native children Congress has consistently required a role for Native parents and Native communities. The United States government has provided an example of considering the views of Native governments by use of the treaty process in which federal government officials negotiated agreements with tribal officials. Thus, the process of negotiations between Native and non-Native is well entrenched in United States law. In the 1942 edition of the *Handbook of Federal Indian Law*, Cohen pointed out that:

> Legislation based upon Indian consent does not come to an end with the close of the period of Indian land cessions and the stoppage of Indian land losses in 1934. For in that very year the underlying assumption of the treaty period that the Federal Government's relations with the Indian tribes should rest upon a basis of mutual consent was given new life in the mechanism of federally approved tribal constitutions and tribally approved federal charters established by the [Indian Reorganization Act]. Thus, while the form of treaty-making no longer obtains, the fact that Indian tribes are governed primarily on a basis established by common agreement remains, and is likely to remain so long as the Indian tribes maintain their existence and the Federal Government maintains the traditional democratic faith that all Government derives its just powers from the consent of the governed. Cohen, 1972, p. 69

This "consent of the governed" has been mandated by Congress in its requirements for Native parent participation in the various educational statutes. Congress has encouraged the states to follow these principles in a number of contexts outside of education. This encouragement for tribal-state negotiations can be considered as a model for conflict resolution with respect to educational issues which Congress has not specifically addressed. Section 16 of the Indian Reorganization Act vested power with the tribal governments to "negotiate with the Federal, State, and local Governments." Other areas in which negotiations have been conducted are modern land settlements including the Alaskan Native Claims Settlement Act (__U.S.C.__), various ancient Indian land claims (Maine, Massachusetts, Connecticut and Rhode Island), the Indian Civil Rights Act (__U.S.C. __)requirement for tribal permission for any extension of state jurisdiction in Indian Country after 1968, Indian Gaming Regulatory Act (__ U.S.C.__) requirements for tribal-state compacts for Class III gaming and Cross Deputization agreements for law enforcement between tribes and states.

All of these areas show the need for continued dialogue and agreement between state and Native governments if problems, including those in educational services for Native communities, are to be effectively addressed.

It took a time span of 480 years since Columbus' contact in 1492 until 1972 when Congress established parent advisory committees to provide elements of Native parent control in Native

education. Since 1972, Congress has continued to provide increasing legal authority for American Indians and Alaska Natives to control educational programs for their people.

Congress intended to provide meaningful measures of financial control for Native governments when it included in Section 16 of the Indian Reorganization Act provisions for Native governments' views on budget development within the Bureau of Indian Affairs.

> The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

A recent United States General Accounting Office report entitled, *Indian Programs: Tribal Influence in Formulating Budget Priorities is Limited*, noted that "in the early 1970s BIA implemented a budget formulation process designed to give Indian tribes a substantial role in setting priorities among programs and their levels of funding." It took a generation for the BIA to involve Natives in the budget development process. This emphasizes the necessity for increased legal authority for Native people to control their educational programs and facilities. This means that working together the Native governments and Congress must reform Native education to meet Native education goals. All the reports of recent decades emphasize the necessity for Native control in their recommendations. Native people themselves emphasize involvement as the key to success (Beaulieu, 1991; Charleston, 1988a; Charleston, 1988b; Charleston, 1990). The recommendations of the Indian Nations at Risk Task Force reached the same conclusions.

Tribal Control Over Public Schools on Reservations

Melody L. McCoy, Attorney for the Native American Rights Fund (NARF), submitted a NARF position paper dated October 26, 1990, to the Indian Nations At Risk Task Force addressing tribal authority over public schools on reservations. This section presents excerpts of the position paper and summarizes its recommendations for new federal policy and legislation regarding public schools on reservations.

> Currently no federal policy or legislation expressly supports Indian control over public schools on reservations or in other Indian country by means of direct tribal governmental regulation. Essential to the success of tribal efforts in this area is a federal policy or legislation that does so. The policy or legislation should include provisions for direct federal funding of tribes in the area of education, notwithstanding the fact that education is provided in whole or in part by states. This paper exhorts the Indian Nations At Risk Task Force to urge the adoption of such a federal policy, including any legislation necessary to implement that policy. (McCoy, 1990, p. 4)

McCoy notes that "to date neither the Supreme Court nor any federal authority has ruled on the existence or scope of inherent tribal sovereign authority over the education of its members by state public schools on reservations. Under existing law, it is reasonable to expect that the existence of such authority would be upheld, but that its scope would be subject to some limitations" (p. 6). However, federal common law clearly recognizes inherent tribal sovereniqty in the area of tribal Native education (*Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 [1982]; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 140). The education provisions of many treaties which establish federal obligations to provide education services do not expressly affect tribal authority over education. McCoy states that it is unlikely that treaty provisions and federal education obligations would be found to restrict tribal authority over education since "...treaties are construed as reserving to tribes all rights not expressly ceded. *United States v. Winans*, 198 U.S. 371 (1905)" (pp. 6-7).

The "school selection" or "land grant" provisions of some treaties and some allotment and homesteading acts reserve sections of land within reservations to the "common" or public schools. McCoy states:

> ...while such provisions arguably confirm some state authority, the provisions also arguably do not impact tribal authority. Rather, they merely transferred to states the authority the federal government would have had, but that transfer leaves tribal authority unaffected. Compare Public Law 280, codified at 18 U.S.C. § 1162; 28 U.S.C. § 1360. Like the federal obligation provisions, the school selection or land grant provisions are not an express relinquishment of tribal authority by treaty. Tribal authority over education therefore could exist concurrently with state authority notwithstanding the school selection and land grant provisions. (p. 7)
>
> ...Like the treaties, the statues [encouraging and funding state education of Natives] do not expressly divest tribal authority over the state public schools. Nor should they be construed to do so. The statutes generally authorize expenditures and contracts for

state education of Indian children. In exchange for educating Indians, the states demanded federal subsidies to compensate for the tax-exempt Indian lands that they serve. Increasingly vocal Indian people also insisted that money for special Indian programs in state schools be available. Thus, the statutes are essentially funding mechanisms; they are not grants or divestments of governmental authority. The statues are generally conspicuously absent of provisions regarding the existence of state authority or the lack of tribal authority over Indian education.

Indeed, several of the recent statutes expressly confirm tribal authority over tribal and Indian schools, and some even sanction a measure of tribal and Indian parental control over and input into the state public schools. For example, Title I of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 455-458a, provides for and encourages tribal and Indian controlled schools. The 1978 amendments to the Impact Aid laws, 20 U.S.C. §§ 240 (b) (3), provide for tribal and Indian parental input into and control over public school district funding applications and programs under Impact Aid. The ammendments also establish a complaint procedure whereby Indian parents and tribes may file complaints against the public school district which ultimately may be reviewed by the federal Department of Education. Such procedures and sanctions are expressly based on the government-to-government relationship between tribes and the federal government. 20 U.S.C. §§ 240 (b) (3) (F). (p. 9)

McCoy noted that:

...state entities and officials are increasingly being found to be subject to tribal authority for their activities on Indian reservations. See, e.g. *Sage v. Lodge Grass School Dist.*, 13 Ind. L. Rep 6035 (Crow Ct. App., July 30, 1986) (No. 82-287). Clearly with respect to on-reservation schools, the states are operating within the exterior boundaries of tribal territorial authority. Nevertheless, unlimited tribal regulatory authority over a state entity would likely be viewed as simply inconsistent with federalist principles and inter-sovereign relations, and therefore impermissible.

Instead, tribal and state authority over Indian education in state public schools would probably be found to be concurrent. This is apparent from federal statutes such as the Johnson O'Malley Act, the Impact Aid laws, the Elementary and Secondary Education Act of 1965, the Indian Education Act of 1972, the Indian Self-Determination and Education Assistance Act of 1975, and the Indian Education Act of 1988. ...The stautues, along with the federal policy encouraging tribal self-government, imply that both state and tribal governments have authority over the state schools that serve Indian children.

Likewise, both states and tribes have strong interests in regulating the public school education of Indian children. States have built and maintained the schools, funded in part by state revenues. They also have extensive existing education regulatory schemes. States have an interest in exercising their sovereign rights to operate public schools systems, and in maintaining their regulatory function regarding public education.

However, tribal interests are legitimate as well. The state schools are operating within the boundaries of tribal territorial authority and are serving tribal members. Tribes have interests in protecting their fundamental rights to exercise their sovereignty, to provide for their people, and to protect their resources, particularly their human resources.

On balance, the state's role in Indian education in state schools may be primary. Most states agreed to maintain public schools as a condition of their statehood. Providing public education in this country is a traditional state function, and with federal approval and assistance in the form of significant funding, that function has been extended to reservation Indians.

Nevertheless, a reasonable amount of direct tribal regulation of state public schools seems justified. It would exist concurrently with the authority of the states and its exercise would be limited so as not to interfere with the states' role. It would be geared specifically towards addressing specific tribal interests which do not inhibit the states from fulfilling their roles. (pp. 12-14)

A tribal education code has been developed for some reservations to define the relationships between tribal and state roles in regulating public school education on reservations. For example, the Rosebud Sioux Reservation Code addresses the following areas:

- Tribal curriculum and education standards, including instruction in Rosebud Lakota lanuguage, history, modern federal-tribal-state relations.
- Tribal alcohol and substance abuse prevention programs.
- The hiring and retention of more Native teachers and administrators.

- Increased and effective parental and community involvement.
- Unique tribal education goals such as the preservation of tribal culture and the promotion of a better understanding of modern tribal government.

The tribal Code supplements rather than supplanting the regulatory role of the state (p. 16).

McCoy urges the development of new federal policy and enactment of implementing legislation to support direct tribal regulatory authority over the public schools. Public Law 100-472, part of the 1988 Amendments to the Indian Self-Determination Act, codified at 25 U.S.C. § 450f, established Tribal Self-Governance Demonstration Projects, or "Direct Funding Project." The Act lends great support to a new federal policy and new legislation that confirms the right of tribes to directly regulate state schools on reservations. The self-governance projects treat tribes in the same manner as states in direct funding of their governmental operations (pp. 17-18). New policies and legislation must include provisions for direct funding to tribes to ensure tribal regulatory control is effective (p. 19).

New Congressional legislation confirming tribal regulatory authority over public schools on reservations is important because of the recent reluctance of the Supreme Court to confirm tribal rights to extend their sovereignty into new areas, or to rely solely on general principles such as tribal sovereignty (McCoy, 1990, p. 20). The impact of legislation on the Court's decisions is evident in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S., 109 S.Ct. 1597. This case involved tribal rights under the Indian Child Welfare Act when children were born off reservation but domiciled on the reservation. The Court upheld wide-reaching tribal rights which were supported with legislation confirming those rights (McCoy, 1990, p. 20).

Effective Educational Performance of Native Students

The 1988 *Report on BIA Education: Excellence in Indian Education* summarized the performance of BIA students on nationally standardized tests as "well below the national averages" (p. 91). The report proposed to replicate the programs at schools which had better test results. This raises the question of accountability with respect to school performance of Native students. On the one hand, this means the development and implementation of standards and instruments for accountability such as those administered at the BIA schools described in the report. On the other hand, this means that Native governmental leadership must understand that just as a trust relationship and fiduciary duties exist between Native governments and the United States, a similar trust relationship and fiduciary relationship exists between Native governmental leaders and the Native people that they represent. The challenge in the educational arena is selecting the choices which represent the best interests of the tribal members.

The options include addressing some immediate goals such as economic development and employment. Clearly, educational success can be measured to some extent by employment. But, Native people who are educated and have the proper credentials, whether as auto mechanics or college professors, may not have the opportunities to work within their home communities.

Self-sufficiency within each Native community will have to be built family by family. At the same time that effective educational systems are developed, business enterprises will have to be developed. In the short run, economic needs can be addressed by having the business enterprises assist in the educational development of Native people. Programs of this nature, which provide on-the-job training, are familiar to Native communities through the CETA and JTPA programs.

The long-term responsibilities of Native governments will be to select the self-sufficiency goals of their particular Native community. In the educational arena, this will mean selecting the academic and vocational/technical programs that suit the needs of their community. This will mean selecting the standards of success through such measures as matriculation, student retention, graduation, and the placement of vocational students in meaningful full-time employment. The development of tribal colleges are an example of this process (Wright & Tierney, 1991, p. 17).

One future for Native education was suggested in the 1988 BIA Report:

> If tribes were to be freed to fend for themselves without BIA oversight, what would be their future relationship to the states? Is it conceivable that, as some Indian groups are proposing, reservations collectively could resemble a 51st state, and that an Indian Department of Education analogous to a State Department of Education would then be formed? (p. 145)

Yet, it is difficult to imagine the achievement of a state of true Native self-determination without much greater economic development than now exists on most reservations. Such development would involve the acquisition of skills and the production of goods and services that mainstream America demands. Reservations would find it very difficult to exist in the modern age as isolated and

autonomous social and economic units. Hence, even if many Natives continue to move back and forth between two distinct cultures, they will need to understand and be able to function effectively within the mainstream American culture. Given this hard reality, the BIA report asks, might Natives be served best by receiving their education in public schools, although knowing that these schools, unlike their BIA counterparts, rarely provide courses on Native history and culture? (p. 145).

After raising this question the report discusses the idea of Tribal Systems of Education:

> A tribal system would include a tribal educational staff with personnel, curriculum, bilingual, computer and other specialists. The tribal system would be responsible for the hiring of school principals and would review the hiring of individual teachers. The Federal contract with the tribe might specify the standards of basic knowledge and skill to which the tribal system would then be held accountable. However, assuming that tribal education met these standards, the tribal system would have wide freedom and independence in choice of curriculum, teaching methods, textbooks, and other basic educational decisions. The Choctaw in Mississippi and the Tohono O'odham (Papago) in Arizona are currently considering how to best begin the contracting of their total education system now operated by the BIA. (p. 146)

Most Native leaders considering these opportunities would find it difficult to find the negative side of the issue. Some Native governments have made progress in economic development (Hill, 1991, p. 25). The American Indian Science and Engineering Society (AISES) recruits Native students into science and engineering fields. AISES feels that it is successful because it emphasizes American Indian culture, high expectations in student performance, and consideration of tribal needs and college achievement (Hill, 1991, p. 26).

What programs like AISES achieve are examples for Native governments and communities to consider in developing their own educational and economic goals. Programs like AISES can be adapted to fit a particular environment in Indian Country and melded with existing tribal college programs.

As the array of possibilities is examined, adapted, or discarded an essential element in the evaluation will be how the particular possibility will effect Native culture. If a particular set of standards, goals, and programs in education can build upon and strengthen tribal culture, a Native community will be willing to support and embrace it. If it fails with respect to the cultural criteria, it is likely to fail altogether.

Summary and Recommendations

The standards set forth five hundred years ago by Francisco de Vitoria to guide the political relationship between the Native peoples of the Americas and the peoples of Europe are the standards that govern that relationship today. The political equality of American Indians and Alaska Natives is manifested in the government-to-government relationship and the recognition of inherent tribal sovereignty. The powers of Native governments are a vital living force utilized every day in Indian Country. The rest of American society may rarely hear or see these powers unless a litigated controversy is handed down from a federal court or the U.S. Supreme Court. It will catch a moment's notice because the idea of Native governmental powers may seem such an anomaly.

Many of the Native governmental powers remain intact; and, although there has been encroachment in some areas as a result of judicial decision or statutory enactment, the basic authority of the legislative, executive, and judicial departments of Native governments remain ready to be exercised. These powers are defended by the Native governments themselves, by the Congress, and by the Courts. Although at the present moment, Congress is the defender of Native governmental powers, the traditional supporter of such powers has been the Court.

When the United States entered into the government-to-government relationship, it made a commitment to support the Native governments. Native leadership can be effective only when it is properly educated. Native peoples regard the provision of resources for proper education as part and parcel of the special legal relationship with the United States.

This paper is not so much about Native education as it is about Native government. The recommendations to be made are quite simple. Congress must continue to support the authority of Native governments to control Native education. In a setting outside Indian Country, control of Native education must remain in the hands of Native parents. And, Congress must provide the financial resources to achieve these goals. History has provided clear evidence that Native education can only be a success when Natives control Native education. And finally, Congress must provide Native governments with the legislative tools to achieve these goals. Of what do these tools consist? They consist of agreements described by Congress

in its New Federalism Report. A century ago these agreements were called treaties:

> We must promise the word of our nation once again by entering into new agreements that both allow American Indians to run their own affairs and pledge permanent federal support for tribal governments. Only by enshrining in formal agreement the federal government's most profound promise will we finally bury the discredited policies of forced tribal termination and Indian assimilation deep in their deserved graves. (New Federalism, p. 17)

The report set forth the circumstances in which the agreements would take place stating:

> The empowerment of tribal self-governance through formal, voluntary agreements must rest on mutual acceptance of four indispensable conditions:
>
> "1. The federal government must relinquish its current paternalistic controls over tribal affairs; in turn, the tribes must assume the full responsibilities of self-government;
>
> 2. Federal assets and annual appropriations must be transferred in toto to the tribes;
>
> 3. Formal agreements must be negotiated by tribal governments with written constitutions that have been democratically approved by each tribe; and
>
> 4. Tribal governmental officials must be held fully accountable and subject to fundamental federal laws against corruption."

The roles and responsibilities of Native government were examined and addressed in this report as well:

> The history of the Indian people convinces us that where federal control has failed, real Indian self-government will succeed. By acknowledging the dignity of our first countrymen, renewing the commitment made to them by the Founding Fathers, and pledging a fresh and full partnership, American Indians can finally inherit the birthright promised them two centuries ago.

Differences in point of view, and indifference to advice from the Native community for a period of over two centuries have prevented the federal government's policy in the area of Native education from being a success. Only now, with the hope of Native control through participation on school boards, parent-teacher interaction, and control of the budget from educational appropriations does success loom on the horizon.

The enduring strength of American Indian and Alaska Native cultures has furnished the foundation to enable the Native people on this continent to endure unbelievable hardships at the hands of the European settlers, and to emerge on the American scene in the 20th century as dynamic cultures whose attitudes toward life, education, and nature can teach all Americans a great deal.

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